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| NO. HHD-LND-CV-22-6160099-S | : | SUPERIOR COURT |
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| 751 WEED STREET, LLC AND | : | JUDICIAL DISTRICT OF HARTFORD |
| W.E. PARTNERS, LLC | : | LAND USE DOCKET |
| | : | |
| v. | : | |
| | : | |
| TOWN OF NEW CANAAN WATER | : | |
| POLLUTION CONTROL AUTHORITY | : | DECEMBER 16, 2022 |

# BRIEF OF PLAINTIFFS 751 WEED STREET, LLC AND W.E. PARTNERS, LLC, WITH APPENDIX

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## I. INTRODUCTION AND SUMMARY.

In this appeal, the owner and contract purchaser/proposed developer of a 3.1 acre parcel located at the west end of downtown New Canaan appeals from the New Canaan Water Pollution Control Authority's July 2022 denial of an application that was filed in compliance with General Statutes § 7-246a and local procedural rules, to move an existing sewer line and its connection to the public sewer system off private property, and into an adjacent public street. The move was proposed to serve a conversion of the sewer-connected subject property from a single-family home to multi-family residential use, consisting of 102 apartments in one U-shaped building.

The Town of New Canaan granted a permit to extend its public sewer system to the subject property, 751 Weed Street, in 1959. In 1996, 751 Weed Street was subdivided, and the part of the sewer line that came to be located on subdivided lots east of 751 Weed Street became part of a "shared collector" sewer pipe, serving five properties, and was subjected to and authorized by a recorded, private sewer easement. Thus, in this case, the applicants propose to disconnect from the shared collector on adjacent private property, and move the connection to the public system within the public street, Elm Street. The proposal would involve moving the sewer line 160± feet to the south, and the public system connection point 135± feet to the west, three manholes, from the present connection. See Appendix, ("A") A1, a diagram.

In the application at issue in this appeal, it is undisputed that (1) all relevant parts of New Canaan's public sewer system (laterals, mains, transmission lines, and the treatment plant) have ample capacity to accept the increased flow that will result from the multi-family use; (2) the subject property, being connected to the public sewer, is already part of the Town's sewer service district; (3) the proposed move of the sewer line will only change the location of the connection point to the public system; (4) the move constitutes better engineering practice because it will facilitate maintenance; (5) the application complied with New Canaan's local procedure for moving a connection point; (6) there are no engineering, environmental, or technical concerns with moving the connection point; and (7) New Canaan's rules provide for administrative (i.e., non-discretionary) approval of a revised connection point.

The sewer application was filed as a result of legal caution and best engineering practice. The existing sewer line on the private properties has sufficient capacity to handle the multi-family use. In addition, the private easement does not limit sewage discharge to any specified use or gallonage. Nonetheless, the owner and contract purchaser/applicants proposed to move the connection point for several reasons. First, moving the increased sewage flow, albeit underground and invisible, from private property to a public right-of-way, would facilitate maintenance and shorten the distance from the subject property to the public system, a much better engineering practice. Second, moving the connection would avoid any claim or litigation by the owners of the servient estates that the increased flow from the multi-family use would overburden the private sewer easement. (This concern proved to be warranted, as the servient estate owners made exactly this threat during the public hearings in this case, s*ee* n.15, *infra*.)

For reasons having nothing to do with the sewer system, public opposition to the sewer application was swift and furious. In January 2022, along with their sewer application, the applicants filed their zoning application, in compliance with General Statutes § 8-30g, the Affordable Housing Land Use Appeals Act. Within days of the filing of these applications, opposition emerged to the housing development plan, but was directed to both the WPCA and the Planning and Zoning Commission, without jurisdictional differentiation. The opposition was led by Town officials: New Canaan's First Selectman, who lives near 751 Weed Street, called the development proposal "an existential threat" to the town. A resident urged the town's land use boards to "Kill this Karp Katastrophe ("KKK")." Another predicted "the fight of your life" if the housing were approved. Residents inundated their elected leaders, land use board members, and Town staff with electronic messages, social media posts, lawn signs, letters to newspapers, and phone calls (and no doubt personal button-holing), attacking the proposed multi-family and affordable housing as, among other things, a dangerous precedent, a threat to public safety, and antithetical to the "character of the town."

The Town Engineer and Town Attorney, in February, initially agreed that the sewer application requested nothing more than a relocation of the existing sewer connection. However,

as public opposition mounted in February and March, both reversed course, recharacterizing the application as a sewer "extension" rather than a revised connection. Their reasons for doing so were unstated but obvious: (1) to try to bring the application under Connecticut caselaw that sewer extensions are discretionary; (2) to enable the WPCA, in the event of an appeal to court from a denial, to argue that the denial should be reviewed under a deferential abuse-of-discretion standard; (3) to allow the WPCA to refer the sewer application to the New Canaan Planning and Zoning Commission under General Statutes § 8-24 for a "negative" report, and then argue that such a report prevents the WPCA from approving the application; and (4) to deny the development through an application that is not subject to the burden shifting of General Statutes § 8-30g, because WPCAs are not covered by the affordable housing statute. In other words, it was not lost on anyone that because sewer applications filed under General Statutes § 7-246a are not subject to General Statutes §8-30g, the town had a better chance of stopping the housing proposal by asserting discretion to deny the sewer application, denying it, and arguing for judicial deference to that action.

The WPCA executed its plan by ignoring the facts of the application, state statutes, and local sewer regulations; calling the application an extension over which it had unfettered discretion; referring the application (over the applicants' objection) to the Planning and Zoning Commission, which promptly issued a "negative" § 8-24 report; and then denying the sewer application, on the irrelevant and unsupported grounds that moving the sewer was unnecessary due to the existence of the private easement, and would create a new maintenance obligation for the Town. The WPCA, therefore, denied the revised connection point, even though the property is already connected to the sewer system, and has been for approximately 63 years; a town ordinance requires the property, whatever its use, to be connected; the town's sewer rules state clearly that the application should have been approved administratively; the town sewer system has ample capacity for the proposal; and there was no engineering; environmental, or technical issue with the proposed connection. In a word, the WPCA's July 2022 denial was pretextual, based on public opposition to the proposed multi-family development and its affordable housing

component, and therefore illegal; and the stated reasons were factually and legally baseless.

In this brief, the owner and applicant explain first why the WPCA had a non-discretionary, administrative obligation to approve the application. Second, this brief explains that the stated denial reasons were pretextual, and the actual reasons were unsupported and illegal. In the alternative, if the WPCA had nominal discretion because the application sought an extension, it exercised that discretion arbitrarily and illegally.

## II. STATEMENT OF UNDISPUTED FACTS.[1]

### A. The Subject Property And The Parties.

Plaintiff 751 Weed Street, LLC is a Connecticut limited liability corporation with an office at 16 Cross Street, New Canaan. Return of Record RE 1 at 20.[2] Plaintiff W.E. Partners, LLC is also a Connecticut limited liability company with an office at 16 Cross Street, New Canaan. *Id*. at 19. Both plaintiff entities are affiliated with Karp Associates, a real estate development and management company with an office in New Canaan. *Id.* 751 Weed Street, LLC owns 751 Weed Street, a 3.1 acre parcel. *Id.* at 17. W.E. Partners, LLC has an option to

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[1] A comment about the Certified List and the Return of Record: Parts 1 and 2 total more than 1600 pages. About one-third of these pages are opposition letters and emails, most of which were directed not only to the WPCA but also the Planning and Zoning Commission, Town officials, and staff. Another 25 percent are emails from April to June 2022 about Town staff's difficulty with opening and reviewing electronic submissions of materials from the applicants. In addition, many of the emails in the Record intermix sewer and zoning issues, and many are duplicates contained in email chains. Thus, about 75 percent of the Record has essentially nothing to do with the merits of the sewer application, and the pages are part of the Record only because the process of untangling the emails to separate collateral matters from the substance of the sewer application, or to eliminate duplication, would have taken several months.

In addition, as further explained on pp. 11-12 *infra*, the application at issue here was originally filed in January 2022, but was withdrawn March 25, and then refiled April 14, to deal with a potential procedural issue in the January application. Upon refiling, the applicants requested that documents submitted January to March be included in the record because the WPCA had conducted one meeting in February; public comments had been received in February and March; and after the re-filing, the processing continued rather than starting anew. Thus, Part 1 of the Record covers January to March 2022, and Part 2 covers April to July 2022.

[2] Part 1 of the Record is organized with Exhibit numbers and Bates-stamped page numbers. Part 2 contains only Bates-stamped page numbers. Thus, Part 1 is cited as "RE [Exhibit number] at [page #], and Part 2 is cited as "R2 at [page #]."

purchase the property from 751 Weed Street, LLC. *Id*. at 22. 751 Weed Street is currently improved with a 10,000± square foot single-family residence; the square footage includes a pool house. R2 at 5. The property is bounded by Elm Street to the south and Weed Street to the west. *Id*. The parcel contains no wetlands. *Id*. at 146, 613.

The New Canaan WPCA (which under Town Ordinance § 51-16 is also the Board of Finance) is the town agency empowered to oversee and administer New Canaan's public sewer system. A WPCA's powers are stated in General Statutes § 7-245. Statutory procedures for specific types of sewer applications are set forth in General Statutes § 7-246a, including sewer system connections and confirmation of sewer system discharge capacity, as requested here. General Statutes § 7-247 spells out WPCA authority to adopt regulations to supplement its regulatory authority. The WPCA has adopted a set of rules and procedures for sewer applications. *See* R2 at 19-23 (excerpt).

The single-family home at 751 Weed Street is currently connected to the New Canaan public sewer system. RE1 at 5; RE 9 at 51; R2 at 33. In 1959, the Town of New Canaan granted approval to then-owner Arthur Watson *to "extend" the Town sewer system to his property*, at the property owner's expense. R2 at 17.

Today, 751 Weed Street connects to the public sewer system through a pipe that runs from the existing residence and property and then east, crossing the property's eastern boundary; then within a recorded private sewer easement that crosses the property at 313 Elm Street; then east along the south side of 313 Elm Street; then south along a private driveway adjacent to 313 Elm Street and 339 Elm Street; and then to its current physical connection to the public system, at a sewer main within Elm Street. RE1 at 5, 22, 24, 27; Appendix A1; R2 at 407. This private sewer easement currently serves five separate properties. R2 at 586-87. (Thus, in easement terms, the properties east of 751 Weed, along Elm, are the servient estates to 751 Weed, the dominant estate.) This connection point, which is the western end of the sewer system serving the downtown area, (*id.* at 531, a system diagram), and is about 360 feet east of the eastern boundary of 751 Weed Street. App. A1. The sewer main within Elm Street eventually connects

to the town's sewage treatment plant, which has available capacity of approximately 500,000 gallons per day. RE1 at 28.

All of the properties in the immediate area north and south of 751 Weed Street, along with all properties east of 751 Weed and fronting on Elm Street, are connected to the public sewer. R2 at 548. New Canaan has not adopted a formal sewer service district with boundaries, even though the Town's 2014 Plan of Conservation and Development recommended this action. *Id*. at 561.[3] Thus, the Town's "sewer district," as referred to by Town staff, is defined by those properties actually connected to the public system, as shown on the town's GIS (Geographic Information System) Map. *Id*. at 531, 561.

B. January 2022 Applications.

In January 2022, 751 Weed Street, LLC and W.E. Partners, LLC filed their § 8-30g application with the New Canaan Planning and Zoning Commission to redevelop 751 Weed Street as 102 apartment homes, in one building. RE 1 at 27. The 102 units would consist of 47 one-bedroom units and 55 two-bedroom units. *Id.* To dispose of sewage from the proposed 102-unit building, the plaintiffs applied in January 2022 to the WPCA (RE 1 at 1), as described above. Based on a conservative assumption of two occupants in every bedroom, and 75 gallons per day per occupant, the 55 two-bedroom units were calculated to discharge 16,500 gallons per day to the sewer system. Using the same assumptions, the 47 one-bedroom units were projected to result in 7,050 gallons of sewer discharge per day, for a total maximum discharge from the building of 23,550 gallons per day. R2 at 550-551. In actuality, the discharge is expected to be far less. *Id*. at 551.

The sewer application proposed minimal construction, in that moving the existing connection would only require only a 6-inch sewer lateral running from the proposed building into Elm Street; then an 8-inch sewer main within Elm Street, for a distance of approximately

[3] New Canaan's 2014 Plan of Conservation and Development, still in effect, recommends: "To help manage sewer capacity, New Canaan should consider adopting a sewer limit line and/or a sewage allocation scheme." It has not done so. R2 at 561.

135 feet, where the pipe will connect to the existing sewer main within Elm Street. *See* Appendix A1; R2 at 407. This proposed reconnection point is only three manholes west of where 751 Weed currently connects to the public system. *Id.* Permission to do utility work in a public street only requires notification of town staff, a routine administrative request. *See* RE1 at 9-10.

The applicant proposed to move the sewer connection point from the private easement to the public street for several reasons: (1) to relieve the abutting, private servient estate owners to the east of the burden of the easement (R2 at 548); (2) to facilitate future maintenance (*id*.); (3) because a shorter connection to the public systems, (40-50 percent) is better engineering practice (R2 at 548, 550, 554, 559, 1053); and (4) to avoid a potential action for an injunction by the owners of the servient estate properties.[4] The sewer application, therefore, as to moving the connection point, was a prudent, cautious, and logical action.[5]

The sewer application was filed under General Statutes § 7-246a, which in relevant part states:

> Whenever an application or request is made to a [WPCA] for (1) a determination of adequate capacity related to a proposed use of land, (2) approval to hook up a sewer system at the expense of the applicant, or (3) approval of any other proposal for wastewater treatment or disposal at the expense of the applicant, [the WPCA] shall make a decision on such application or request within sixty-five

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[4] The private sewer easement appears in the Record in several places, starting with RE 10 at 55-60. At 56, second paragraph, the easement states that it authorizes a "permanent easement to install, construct, use, maintain, repair or replace…a sanitary sewer pipe(s) and manholes at such locations as deemed necessary to properly service said pipes," without limit or restriction as to the use or volume of discharge.

[5] Case law in Connecticut and elsewhere supports the conclusion that, barring an express restriction in the easement, increasing the volume of discharge *per s*e in a sewer pipe does not overburden an easement. In *Leoni v. Water Pollution Control Authority*, 21 Conn. App. 77 (1990), the Court held that the addition of a new sewer line within an existing utility easement was merely intensification of the use of the existing easement. *Id.* at 78-79, 84. In other jurisdictions, increasing the volume of sewage flowing underground within an existing or new pipe has been held to not overburden a sewer easement. *See* e.g., *Continental Illinois Nat. Bank and Trust Co. of Chicago v. Village of Mundelin*, 85 Ill. App. 3d 700 (1980) (A65); and *Parris Properties, LLC v. Nichols*, 305 Ga.App. 734 (2010) (A49).

days of receipt, as defined in subsection (c) of section 8-7d, of such application or request.

The January 2022 WPCA application was filed pursuant to New Canaan's sewer use rules, §§ 326 (discharge modification)[6] and 327 (change of use)[7]. *These sections specifically address what was proposed here, a change in the volume of discharge and use leading to an existing connection point.* Section 229 (R2 at 19-23) of the sewer rules governs new connections to the public system (and thus was not applicable), but also spells out the administrative procedures for application review by Town staff and departments, so the applicants followed the procedural direction of that section as well.

The move to Elm Street was not proposed as, and does not qualify as, a proposal to "extend" or "locate" a public sewer *system*, either in the plain-meaning sense or within the meaning of General Statutes § 8-24.[8] This is because (1) the Town *in 1959* granted permission to "extend" the public sewer system to the subject property (R2 at 546); (2) 751 Weed Street is, therefore, already connected to the sewer system, (App. A1); (3) the application at issue here

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[6] Section 326 states (emphasis added): "Any user proposing a new discharge into the public sanitary sewer system or *a substantial change in volume* or character of pollutants that are being *discharged into the public sanitary sewer system* shall notify the New Canaan Engineering Department at least forty-five (45) days prior to the proposed change or connection. When any building having an existing connection to the public sanitary sewer system is modified or replaced so as to discharge a greater volume of sewage or create a significant change to the characteristics of pollutants discharged into the public sanitary sewer system than it did prior to its modification or replacement, the owner(s) of the building *shall be required to apply for a new sanitary sewer connection permit as set forth in this Article."*

[7] Section 327 states (emphasis added): "When any building which has *an existing connection* to the public sanitary sewer system is *modified or replaced* so as to discharge a greater volume of sewage or create a significant change to the characteristics of pollutants discharged into the public sanitary sewer system than it did prior to its modification or replacement, the owner(s) of the building *shall be required to apply for a new sanitary sewer connection permit as set forth in this Article."*

[8] General Statutes § 8-24 provides in relevant part: "No municipal agency or legislative body shall….locate or extend public utilities…for…sewerage…. until the proposal to take such action has been referred to the [planning] commission for a report….." The coverage of this part of the statute is shown in part by the fact that it refers to "locating" or "extending" a sewer, but does not use the word "relocate," which terms is, in the statute, used to cover other municipal improvements such as parks and schools. In other words, relocating an existing sewer, without changing the system per se, is not covered by § 8-24.

does not propose or facilitate extending the *sewer system to one or more new properties*, or "locating" new pipes to do so (R2 at 548); and (4) Town Ordinance § 51-1[9] requires all properties with an "available" sewer main to connect to the public system, regardless of whether they are currently connected. *Id.* at 354.

The Town Engineer, in a February 4, 2022 memo, agreed that the application sought a connection under town rules, *not* an extension (RE 1 at 33-34). She did request the applicant to conduct video inspections and "flow monitoring" of various segments of the sewer system, to confirm the condition of pipes and their capacity. *Id*. Although the applicant's consulting engineer pointed out that the scope of the request exceeded prior local practice and engineering standards, the applicants agreed to conduct the work. RE 198 a 361. In a March 18 memo to the WPCA, the Town Engineer stated that there were "No known issues" with New Canaan's sewer system as it serves the 751 Weed Street property. RE 9 at 51.

The WPCA received the application at its February 10, 2022 hearing, at which meeting the applicants and their consulting engineer were allowed to present a brief explanation of the application and its justifications. RE 198 at 356-62.

On February 14, 2022, the New Canaan Town Attorney advised the WPCA in a memo that the application was a connection, not an extension, and that its purview in reviewing the sewer application was limited (original emphasis):

> Several questions have arisen with respect to the town processes and procedures as a result of the request to permit a 102-unit multifamily development to connect to New Canaan's municipal sewer. As part of the application, the developer has also sought an "allocation of capacity" for the project. It is the WPCA's duty to

[9] The ordinance states (emphasis added): "*No new houses or buildings used for human habitation shall be constructed on property abutting streets wherein public sewer lines are available, unless such houses or buildings are provided with connections to such public sewer lines.* Existing houses or buildings used for human habitation on property abutting streets where public sewer lines are available shall be connected with such sewer lines when the Director of Health shall so order. If such property owner fails to connect such house or building with such sewer line upon reasonable notice by the Director of Health, the Town may make such connection and the cost thereof shall become a lien on the property to be collected in the same manner as taxes are collected."

> decide the application, limited to those two issues.
>
> However, for the WPCA, it is simply a question of reviewing an application for a multi-family development, as if the property were zoned for multi-family use. In other words, the WPCA should not consider "land use" criteria, including zoning compliance, impact on wetlands, historical factors, and similar considerations. Those matters, if relevant, will be considered by the appropriate town bodies. . . .
>
> In evaluating the application, the WPCA has limited discretion. *Since the property is within the sewer district and is currently connected to the sewer, the applicant will argue that it has a right to the connection. That conclusion is supported by case law. . . .*

R2 at 28-29.

In March 2022, the Town Engineer and Department of Public Works received a memo from AECOM, a consulting firm, confirming that the Town of New Canaan's sewage treatment plant has ample available capacity to receive the sewage discharge proposed for the 102-unit redevelopment at 751 Weed Street. *Id.* at 553, 1038.

In February and March 2022, public reaction to the sewer application was immediate and vitriolic, and included the following statements in emails sent to the WPCA and other town officials:

- "This is an existential threat to New Canaan's village character…" – First Selectman Kevin Moynihan (RE 113 at 226);
- "All of New Canaan Town governance should **K**ill this **K**arp **K**atastrophe" ("**KKK**") – Peter Thomson Hovey, resident (RE 174 at 330);
- "I support litigation of the Karp development even if our chances of winning are low." – Richard Goarkin, resident (RE 182 at 328);
- "[Imagine] walking in Irwin Park with an additional 102-404 people or our class sizes moving from 24-50 kids in a class…." – Karyn Feiner, resident (RE 139 at 266); and
- "Just know that the neighbors of 751 Weed Street are outraged….[we] have nothing but time to litigate in the courts. If you allow this to happen, get ready for the fight of your life" - Kevin Sheridan, resident (RE 51 at 153).

The Court may note that in Part 1 of the Record Exhibits (RE) 44 to 193 are mainly opposition letters and emails, and many use identical language.

This rapid influx of messages led WPCA Chair Lavieri to warn WPCA members three times that they should not express opinions or forecast their vote. In a February 13, 2022 email

to WPCA members, the Chair stated: "As our email boxes fill up with input from town residents, let me share a few reminders [about not responding]." RE 26 at 92. In a February 26, 2022 email, Chair Lavieri had to send another reminder: "During this period when this application is in front of the WPCA, all [Board of Finance] members must completely refrain from engaging in any public or private discussion or actions related to this application. Online, or on social media. No exceptions. We had to ask one member to recuse themselves. . . ." RE 31 at 100. The Chair also had to advise the Public Works Director and staff to the WPCA to stop telling citizens about the WPCA's processing of the application. RE 40 at 134.

Despite the facts, the applicable statutes, WPCA regulations, and the Town Attorney's memo in February 2022, and contrary to the application, and without any discussion with the applicant, Town staff in March began to characterize the application as an "extension" of the town's sewer system. RE 9 at 51-52. Town staff published the agenda for a March 29 WPCA hearing that, without the applicant's knowledge or consent, changed the description of the subject matter of the application, to a "possible extension" of the sewer and a possible § 8-24 referral to the PZC. RE 11, 12 at 73-74.

In late March, due to a technical defect discovered in the January 2022 application,[10] the applicants withdrew the filing its January 2022 application, informing the WPCA of their intent to re-file promptly (RE 13 at 75), which they did on April 14, 2022. R2 at 2.

C. April 2022 Refiling

The WPCA accepted the re-filed application on May 10, 2022, and then scheduled a hearing for June 7, 2022. *Id.* at 111.

Prior to the June 7, 2022 WPCA hearing, New Canaan Health Director Jen Eielson

[10] In late March, the applicant discovered that the deed to 751 Weed Street LLC, executed in December 2021 (RE 1 at 17), for unknown reasons, had not been recorded by the New Canaan Town Clerk prior to January 25, 2022, when the applicants filed their application, which represented the LLC as the fee owner. Though the applicants, in possession of a signed deed, could have argued that they were the equitable owners, they took the cautious approach of re-filing the deed and then resubmitting to the WPCA, and the PZC. RE 13 at 75.

issued a memo stating that although she had "no comment" on the sewer application, Town Ordinance § 51-1 requires the subject property, being in a location where a septic system is not feasible to be connected to the public sewer system. R2 at 354; *see* n. 9 *supra*.

D. June 7, 2022 WPCA Hearing.[11]

At the June 7, 2022 WPCA hearing, the Town Attorney, contrary to his February 2022 memo, advised the WPCA that it had *discretion to decide the legal issue* of whether the application was an "extension." R2 at 538.

The applicants and their consulting engineer made their presentation. R2 at 545-63.[12] (These pages summarize the important, core facts regarding the application.) The applicants, through their consulting engineer, verified that (1) the collector laterals within the private easement as well as the public system sewer main within Elm Street are in good condition; (2) moving the connection point would shorten the private-public connection and reduce maintenance, and thus would be a better engineering practice than the current route; (3) no new properties would be connected to the system; (4) the system has ample capacity to handle the proposed discharge from 102 apartments; (5) there are no engineering, technical, or environmental issues with moving the sewer connection into Elm Street; (6) because the Elm Street sewer line is the west end of the public system and properties further west are on septic, no new properties would be connected to the system by moving the 751 Weed Street connection point; (7) the application did not propose an extension of the sewer system that should be referred to the PZC under § 8-24; and (8) a newly-installed connection would be essentially

[11] The June 7 hearing included an effort by the applicants to establish on the record, that no member of the WPCA has predetermined his or her vote on the application. The applicants made this inquiry aided by a Freedom of Information Act request (R2 at 229.), based on the Chair's several emails in February, March and May 2022, directing members to not state their intentions on voting in advance of hearing the application. In a testy exchange, Chair Lavieri summarily reported that no members had prejudged and not a single one had any email response to disclose in response to the FOI request. RE2 at 542-545. Rather than engage in a protracted dispute, the applicants, with the denials on the record, moved on. *Id.* at 545.

[12] *See* R2 at 48, 72, 552, 623, 808, 927, 1038.

maintenance-free for decades. *Id.*

Town Engineer Maria Coplit (R2 at 563-69) confirmed that 751 Weed Street is part of the Town's sewer district; the revised connection would not allow in new properties; and there were "no known issues" with the sewer system as it serves 751 Weed Street. Nevertheless, she stated that her office was opposed to the application because the new piping would need to be maintained by the Town[13]; the construction would "disrupt" Elm Street; and the Town has "no current or future plan" to extend the public sewer in this location.[14] *Id.*

At the June 7 hearing, an attorney representing owners of property adjacent to 751 Weed Street and parties to the private sewer easement confirmed that his clients were opposed to any use of the existing private sewer easement for the increased sewage discharge, and would bring an action to enjoin one of the existing sewers if authorized by the WPCA.[15] R2 at 346, 571. (In February, a Weed Street property owner had expressed an opinion that the sewer easement would be an "invalid" basis for the proposed development, s*ee* RE 134 at 255.)

At the end of the June 7, 2022 hearing, the WPCA voted, with minimal discussion, unanimously, and without reasons, that the application "involves an extension of the municipal sewer" and referred it to the PZC for a General Statutes § 8-24 report. R2 at 412.

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[13] This was not accurate because even though the current piping is on private property and subject to a private easement, it is still part of the public system, maintained by the Town. Also, she did not quantify the "cost" of maintaining 135 feet of new piping.

[14] This statement was disingenuous because the Town has no sewer plan at all, and no need for a plan in the area of 751 Weed because the property is already connected and all properties west of Weed Street are on septic.

[15] This actual threat of litigation illustrated (and exacerbated) the dilemma for the applicants that resulted in their application to move the sewer line. As noted, the existing private sewer serves five properties in addition to 751 Weed Street. Testing of the pipe confirmed capacity to handle the sewage discharge from 102 apartments. In addition, as explained in n.5 *supra*, increased sewage discharge volume *per se* does not constitute overburdening a sewer easement so long as the pipe has adequate capacity and no engineering or environment issue will result. However, the threat of litigation would not actually become ripe unless and until either the New Canaan WPCA granted the application, or a court reviewing a denial reversed the Commission. So, to avoid the scenario of obtaining a court-ordered approval *and then* facing an injunction action by the servient estate owners, the applicants here opted to apply to the WPCA to move the sewer connection point into the public street.

E. June 16, 2022 Planning and Zoning Commission § 8-24 Referral.

When a WPCA refers a utility extension application to a planning commission under General Statutes § 8-24, the planning commission's task is to review the utility proposal, *not the land use it would serve*, for consistency with the Town's Plan of Conservation and Development ("POCD"). In other words, the PZC reviews and provides a "report" on what is pending before the WPCA, not whatever land use proposal might result from the sewer application; indeed, this sewer application contained only enough facts about the proposed land use to calculate the intended sewage flow, so to the extent that PZC delved into the proposed land use, it was going beyond what was before the WPCA, and speculating. As noted earlier, New Canaan's POCD, at p. 90 (*see* n. 3 *supra*), states that the Town does not have a sewer system plan or map, but to "help manage capacity, New Canaan should consider adopting a sewer limit line and/or sewage allocation scheme." The POCD otherwise says nothing about the Town sewer system, so the PZC had nothing by which to evaluate whether moving the sewer connection point was consistent with the POCD.

At the PZC meeting on June 16, 2022, the applicant explained its objection to the referral, and that the PZC, even if it had jurisdiction, was confined to reviewing the sewer application without consideration of the proposed affordable and multi-family housing land use that the sewer move would serve (R2 at 1055-59). The PZC, ignoring the Town Attorney's advice about avoiding land use, issued a "negative" report, a finding of inconsistency with the POCD, because (1) 751 Weed Street is located in a One Acre (single-family) Zone; (2) multi-family development at 751 Weed Street would be contrary to the "character" of the community; (3) moving the connection has "no planning benefit" to the Town; and (4) the sewer proposal was not "appropriate." *Id.* at 844.[16] The report was transmitted to the WPCA in a letter dated June 28,

[16] A planning commission's § 8-24 report is advisory and not appealable, s*ee Fort Trumbull Conservancy, LLC v. Planning and Zoning Comm'n*, 266 Conn. 338, 356-60 (2003).

2022. *Id.*[17]

F. July 12, 2022 WPCA Hearing and Denial.

The WPCA reconvened its hearing on July 12, 2022. R2 at 1034. The Town Engineer reiterated her opposition to the application, but this time said that the applicant had no "hardship" to justify the application. *Id.* at 1036. She stated that the application was only a preference (as though the applicants have no reason for the move); the Town had no plan to install a sewer line additional piping within Elm Street; and re-piping would disrupt Elm Street and create a maintenance obligation, without explaining why the maintenance would be onerous or costly. *Id.* at 1036-37.

She did not explain what she meant by hardship. At that hearing, in response to the Town Engineer concern about construction within Elm Street, the applicants offered an alternative sewer plan, with the sewer connection along Elm Street being located within the right-of-way of Elm Street, but not within the paved vehicular travel way, except at the actual connection point. *Id.* at 1012. The Town Engineer dismissed the alternative. *Id.* at 1036-37.

The applicants further confirmed that video monitoring had confirmed the condition and capacity of all sewer pipes. R2 at 1051-59. The applicants also explained their disagreement

[17] The negative § 8-24 report ultimately has no impact on this appeal, for several reasons. First, as explained earlier, no referral was warranted. Second, as just noted, even though § 8-24 refers to the proposed action (moving the connection point) not being "adopted" by the municipality unless its legislative body overturns the § 8-24 report by a two-thirds vote, General Statutes § 7-246a sets forth a clear, specific obligation of a WPCA to act on a sewer application regardless of a § 8-24 report, and a clear, specific right of a denied applicant to appeal to Superior Court. Section 7-246a is also a later-adopted, more specific statute than § 8-24, which was adopted in 1949, and thus § 7-246a governs the right to appeal. Moreover, to interpret a § 8-24 negative report as requiring an appeal to the Town's legislative body would contravene the *Fort Trumbull* holding, 266 Conn. 338, that a § 8-24 report is advisory and unappealable; and if a negative report is not applicable, that would give the PZC an unappealable veto over a sewer application, a nonsensical result.

This issue was litigated in *Summit Saugatuck, LLC vs. Westport Water Pollution Control Authority*, HHD-CV-20-6143715-S. The trial court held that a negative 8-24 did not stop the WPCA process. The Appellate Court reversed on a procedural error basis, 193 Conn. App. 823 (2019). The issue was pending in the Supreme Court (S.C. 20434) in 2021 when the parties settled, granting a § 7-246a sewer extension and capacity allocation.

with the PZC's negative § 8-24 report, including stating again that since the property is already connected to the sewer and no new properties would be sewered by moving the connection, the application did not present any land use planning issue, only an issue of sewer system engineering and management. *Id.* at 1055-59.

The applicant's consulting engineer stated his professional opinion that moving the connection was a better engineering practice, and would have no adverse impact on the system; the public sewer system had ample capacity to serve the proposed redevelopment and its relatively minimal additional flow; there were no engineering, technical, or environmental issues involved in moving the connection point; and once the sewer was installed, connected, and tested, the cost to the Town regarding future maintenance would be minimal. *Id.* at 1053-55.

The WPCA then voted unanimously to confirm that the sewer system has capacity for the requested capacity allocation, but to deny the application. R2 at 1066. WPCA's resolution is contained in the Minutes of the July 12, 2022 meeting (emphasis added):

> [Chairman Lavieri]…..stated that *there is currently access to the Town's sanitary sewer system via a private easement and therefore the extension of the public system is not required.* He also reiterated that the Town Engineer has recommended against approval and that the WPCA determined at the June 7, 2022 meeting that the proposed new manhole and extension of the sewer line constitute a municipal improvement and therefore referred the application to the Planning and Zoning Commission for an CGS§ 8-24 review in which the Planning and Zoning Commission subsequently issued a negative report. He did note that regarding the issue of capacity, *that there is adequate capacity for the proposed project*. He then called for approval of a resolution for the reasons stated above, that the application of 751 Weed Street, LLC, for approval to construct a new sanitary sewer manhole and an extension of 135 linear feet of new sewer main in Elm Street be denied. Mr. Schulte made a motion, seconded by Ms. Neville, to approve the resolution as presented. The motion was approved unanimously. Chairman Lavieri then asked for a motion to confirm that the WPCA is in agreement that there is capacity in the system to accommodate the proposed development.

R2 at 996.

The applicants filed this appeal on August 10, 2022 in the Superior Court Judicial District of Stamford-Norwalk. The appeal was transferred to this Court on August 31, 2022.

## III. THE PLAINTIFFS, AS OWNER AND CONTRACT PURCHASER, AND AS THE DENIED APPLICANTS, ARE AGGRIEVED AS A MATTER OF LAW

"[P]leading and proof of aggrievement are prerequisites to a trial court's jurisdiction over the subject matter of an administrative appeal ... [I]n order to have standing to bring an administrative appeal, a person must be aggrieved…. Aggrievement presents a question of fact for the trial court and the party alleging aggrievement bears the burden of proving it." General Statutes § 7-246a states that appeals from water pollution control authorities may be appealed following the procedures for zoning appeals set forth in General Statutes § 8-8, which would include aggrievement procedures and standards.

751 Weed Street is, and has been at all times relevant to this appeal. The record owner of the subject property, W.E. Partners LLC is the contract purchaser of the subject property. Both LLCs were applicants to the WPCA whose application to the WPCA was denied. Accordingly, both entities are aggrieved as a matter of law. *See, e.g. Goldfeld v. Planning and Zoning Comm'n*, 3 Conn. App. 172 (1984)

## IV. STANDARDS OF REVIEW.

"Where the administrative agency has made a factual determination, the scope of review ordinarily is expressed in such terms as substantial evidence....Where, however, the administrative agency has made a legal determination, the scope of review ordinarily is plenary." *Quarry Knoll II Corp. v. Plan. & Zoning Comm'n* 256 Conn. 674, 721 (2001). In particular, interpretations of state statutes and municipal regulations present questions of law which require plenary review, with no judicial deference to municipal agency views or conclusions. *See Graff v. Zoning Bd. of Appeals*, 277 Conn. 645, 652 (2006); *see also Trumbull Falls, LLC v. Plan. & Zoning Comm'n*, 97 Conn. App. 17, 21 (2006); *Blakeman v. Plan. & Zoning Comm'n*, 82 Conn. App. 632, 638-39 (2004), *cert. denied*, 270 Conn. 905, (2004).

Given the above, and because the WPCA's evaluation of the application at issue here involved both the interpretation of General Statutes § 8-24 and findings of fact, the question of

whether the WPCA had discretion to consider the application at issue here an "extension" within the meaning of General Statutes § 8-24 is a mixed question of law and fact.

Whether the WPCA had the legal authority to deny the sewer application when it complied with the governing regulations is a legal question, subject to plenary review without deference. *See* 9A Conn. Prac., Land Use Law & Prac. § 44:7 (4th ed.) (agency acts in administrative capacity when acting on application for sewer connection); *see also Pansy Rd., LLC v. Town Plan & Zoning Comm'n*, 283 Conn. 369, 374 (2007) (noting plenary review in evaluating authority of municipal commission to deny application when sitting in administrative capacity).

When it appears that a public agency reasonably could reach only one conclusion, the court may direct that agency to do that which the conclusion requires.

> It is familiar law that, for the plaintiff to prevail in an action of mandamus, she must establish three elements: "(1) that [she] has a clear legal right to the performance of a duty by the defendant; (2) that the defendant has no discretion with respect to performance of that duty; and (3) that the plaintiff has no adequate remedy at law." (Internal quotation marks omitted.) *Harlow v. Planning & Zoning Commission*, 194 Conn. 187, 196, 479 A.2d 808 (1984). Since this plaintiff's application complied with the sewer regulations governing the amount of sewage that may be discharged into the sewerage system from 952 Boston Post Road, the defendant sewer commission clearly had a duty to issue the necessary sewer permit. The commission had no discretion to refuse to issue a permit when the application complied with the regulations that it had promulgated, as we have determined. The defendant has suggested no *legal* remedy available to the plaintiff, and this court is aware of none.

*Schuchmann v. City of Milford*, 44 Conn. App. 351, 358 (1997).

The plaintiffs here argue, in the alternative, that if this Court holds the WPCA had discretion to consider the sewer application an extension, then this Court will review the Commission's denial under an abuse of discretion standard. *See Forest Walk, LLC v. Water Pollution Control Authority*, 270 Conn. 271, 279 (2009) (referencing the abuse of discretion standard, but noting that "[w]ater pollution control authorities … cannot exercise that discretion in an arbitrary or discriminatory manner or in contravention of the plain meaning of their

regulations"); *see also AvalonBay Communities, Inc. v. Sewer Comm'n*, 270 Conn. 409, 433 n.26 (2004) (a water pollution control authority's discretion in denying an application would be reviewable to assure that it was "exercised under the law and not contrary thereto, and it must not be arbitrary, vague or fanciful but legal, regular, and sound discretion governed by rule and exercised under the established principles of law").

## V. STATE STATUTES AND CASELAW REGARDING SEWERS

In Connecticut and elsewhere, sewers are "public utilities," meaning that they are public services paid for by property tax revenue, and thus property owners and taxpayers are entitled to non-discriminatory access to and use of the system, subject to reasonable regulation as authorized by state statutes, and local regulations if adopted. If a parcel of land is within a town's defined sewer service area; that parcel can be connected to public sewer without a physical extension of the sewer *system*; the existing collector laterals, mains, and treatment plant have adequate capacity; there are no engineering, technical, or environmental reasons why a property cannot be connected; and the application satisfies all applicable rules, then the property owners have a right to connect or reconnect.

A municipal sewer system is a public utility. *See Metro. Dist. v. Hous. Auth. of City of Hartford*, 12 Conn. App. 499, 504 (1987). The "principal determinative characteristic of a public utility is that of service to, or readiness to serve, an indefinite public" who "has a legal right to demand and receive its services." 64 Am. Jur. 2d Public Utilities, § 2. "A public utility holds itself out to the public generally and may not refuse any legitimate demand for service. . . ." *Id.* Accordingly:

> Upon the dedication of a public utility to a public use and in return for the grant to it of a public franchise, the public utility is under a legal obligation to render adequate and reasonably efficient service impartially, without unjust discrimination, and at reasonable rates, to all members of the public to whom its public use and scope of operation extend who apply for such service and comply with the reasonable rules and regulations of the public utility.

*Id.* at § 21; accord *Cedar Island Imp. Ass'n v. Clinton Elec. Light & Power Co.*, 142 Conn. 359, 373 (1955). *See also United Farmworkers of Florida Housing Project, Inc. v. City of Delray Beach*, 493 F.2d 799, 808 (5th Cir. 1979) ("[Once] a municipality begins to offer [sewer] services beyond its incorporated area, it can no more refuse these services to an outsider for racial reasons then it can refuse those services for racial reasons to one of its own residents"). Discrimination in the provision of sewer service to a class protected by the federal Fair Housing Act has been held a violation of that Act. 42 U.S. Code § 3604 *et seq.*, s*ee e.g., Community Services, Inc. v. Wind Gap Mun. Authority*, 421 F.3d 170 (3d Cir. 2005).

Numerous other jurisdictions hold that sewers are public utilities, and thus property owners have a right to access and use thereof. "A sewer line constitutes a public service, available to all property owners who wish to connect with it." *See McQuillin's The Law of Municipal Corporations,* § 31.11 (quoting *Cabot Industries Development Corp. v. Sherman Concrete Pipe Co.*, 387 S.W.2d 336, 337 (Ark. 1965), (A18). In Georgia, where a previous case had caused confusion with respect to whether or not access to public sewer was a requirement, the court clarified by stating, "That case does not hold that a municipal utility can arbitrarily deny such service to one of its citizens living within its corporate limits." *DeKalb County v. Townsend Associates, Inc.*, 252 S.E.2d 498, 500 (Ga. 1979) (clarifying *Denby v. Brown*, 199 S.E.2d 214 (Ga. 1973) (A62).

In Massachusetts, a statutory right of citizens to connect to public sewer has been established, and has been confirmed through the courts. "The pertinent part of that statute states: 'If the owner of…land shall make to the board or officer having charge of…sewers application to connect his land with a common sewer, such board or officer shall make such connection.' This provision has been construed as establishing a 'present legal right' to a connection so long as the resulting added sewage does not pose an immediate risk of overloading the existing system." *See K. Hovnanian at Taunton, Inc. v. City of Taunton,* 642 N.E.2d 1044, 1047 (N.J. 1994) (A42).

In New Jersey, residents of a municipality have a right to access public sewers. *See Bi-County Development of Clinton, Inc. v. Borough of High Bridge*, 805 A.2d 433 (N.J. 2002). (A2)

Under General Statutes § 7-246(b), WPCAs are empowered to determine the location, size, capacity, and cost of sewer service areas, and (under § 7-247) to adopt rules and regulations for treatment systems and the management, operation, and use of existing or proposed sewer lines. Establishing sewer system locations and approving system extensions are discretionary decisions, but applications for engineering and revisions within the existing system, such as revised connection points, are administrative. In other words, a sewer commission exercises discretion when it adopts a sewer service area (and in some cases, a sewer avoidance area) map, sizes its treatment plant and transmission lines, and adopts regulations. *See Schuchmann, supra,* 44 Conn. App. at 356-58. After doing so, however, it is obligated to follow its rules, including approving proposals that comply with those rules. *Id.*

Sewer commissions' discretion to determine system limits and extensions is not unlimited, and can be overruled if abused.[18] *See AvalonBay v. Sewer Comm'n, supra*, 270 Conn. at 423. In *AvalonBay*, the Court stated that "the date of construction, the nature, capacity, location, number and cost of sewers . . . are matters within the municipal discretion with which the courts will not interfere, unless there appears fraud, oppression, or arbitrary action." *Id.*

In general, Connecticut case law holds that sewer systems are not to be administered to control or dictate land use, and WPCAs may not use sewers to control or dictate land use, because land use is the exclusive purview of the town's zoning commission. A sewer commission may not exercise powers within the jurisdiction of another agency, such as a municipality's zoning commission. *See Dauti Constr.v. Water & Sewer Authority*, 125 Conn. App. 652, 662-64 (2010). "[T]he power to determine what are the needs of a town with

[18] *See* General Statutes §§ 7-246 and 7-247; *AvalonBay, supra,* 270 Conn. at 425-26 (municipal boards and commissions, including sewer commissions, possess only those powers expressly granted by the state); *River Bend Assocs., Inc. v. Water Pollution Control Auth.,* 262 Conn. 84, 95-97 (2002); *see also Vicksburg v. Vicksburg Waterworks Co.,* 202 U.S. 453, 471-72 (1906); *Archambault v. Water Pollution Control Auth.,* 10 Conn. App. 440, 444 (1987).

reference to the use of the real property located in it and to legislate in such a manner that those needs will be satisfied is, by statute, vested exclusively in the zoning commission." *Harris v. Zoning Comm'n*, 259 Conn. 402, 425 (2002). If a sewer commission dictates, through sewer decisions, uses of land, its action is *ultra vires*. *See Dauti Constr.*, 125 Conn. App. at 662-64.

*Thus, once a WPCA has designated a parcel for sewer service and has spelled out criteria for connecting to the system, it cannot retain discretion to deny sewer service on a case-by-case basis. See id.* at 664; *Schuchmann*, 44 Conn. App. at 356-58. More specifically, when (1) an applicant's land is in the designated sewer service area; (2) the system has ample capacity; (3) the applicant does not seek to extend the sewer across land not in the sewer district; and (4) the application otherwise complies with the WPCA's regulations and specified technical and engineering criteria, the agency has no discretion to deny the connection. *See Dauti Constr.*, 125 Conn. App. at 662-64 ("When it appears that a public agency reasonably could reach only one conclusion, the court may direct that agency to do that which the conclusion requires."); *see also Schuchmann*, 44 Conn. App. at 358 ("The commission had no discretion to refuse to issue a permit when the application complied with the regulations that it had promulgated"). Section 7-247 [which specifies sewer commission powers] "*does not vest the commission with the discretion to deny an application that complies with its regulations* because of considerations not set forth in the regulations, but requires that the statutory powers of a water pollution control authority be exercised through the regulations it is directed to adopt." *Schuchmann*, 44 Conn. App. at 356 (emphasis added).

The Court's decision in *Forest Walk v. Water Pollution Control Authority*, 291 Conn. 271 (2009), upholding the municipal denial of a sewer extension, provides a contrast to these criteria and this case. In *Forest Walk*, the property proposed to be sewered was not only not in the town's sewer service area, but also was contrary to an adopted "sewer avoidance" policy. *Id.* at 277, 289-90. Moreover, in several ways, the property owner's plan did not comply with the town's sewer regulations. *See id*. The Court affirmed the dismissal of the appeal, not because it proposed a sewer extension *per se*, but because the "extension was not warranted because the

property was not located in an area designated for sewer service" and was contrary to long-standing, well-documented "state and town sewer avoidance policies that had been in effect since 1991." *Id.* at 293.

## VI. THE WPCA HAD A MANDATORY, NON-DISCRETIONARY OBLIGATION TO APPROVE THE APPLICATION.

Here, the evidence in the Record establishes as undisputed facts that:

- The Town in 1959 exercised its discretion to extend sewer service to the subject property;
- The subject property is therefore located in the town's sewer district;
- All sewer system parts are in good condition;
- Ample sewer capacity exists in the sewer lines and the treatment plant;
- There are no engineering impediments to moving the connection;
- The connection point can be moved without any adverse impact;
- The proposed connection complies with the town's regulations, which provide for administrative approval of a change of use or change of discharge volume, and provide for administrative approval;
- No new properties would be added to the sewer system by moving the connection;
- Moving the connection point and shortening the connection distance are better engineering practice than the current private easement route; and
- Moving the connection will not alter the boundaries of the town's sewer district.

Moreover, (1) the Town Engineer's statement that the Town has "no plan" for an additional sewer pipe within Elm Street does not mean the Town has a plan and the application contradicts it, but rather that the Town *has no plan* at all; (2) the Town Engineer's statement that granting the application would "disrupt" Elm Street is contradicted by the minimal length of the work, and the fact that public streets are "opened" routinely for utility work by administrative permit; and (3) the Town Engineer's statement that the Town would take on a maintenance obligation was unquantified and contradicted by the applicant's consulting engineer, who testified without challenge that a properly installed sewer pipe is intended to last for decades.

Under these circumstances, and under the cases described above, the WPCA had an obligation to approve the application. The applicants did not propose an extension of the sewer system. The system has capacity. The WPCA's denial did not identify any non-compliance with or violation of a town sewer plan, regulation, or policy, especially § § 326 and 327. The WPCA

cited the applicant's decision to avoid the potential risk and certain delay of using the existing private sewer easement to serve the multi-family development, but that it is the applicants' prerogative, and is not an adopted WPCA criterion or policy. To the extent that the WPCA was relying on the Town Engineer's comments that moving the connection point would increase (by an unspecified amount) the Town's maintenance obligation, the applicant's engineer Leonard D'Andrea disproved that contention. The Town Engineer's statement that the application was "contrary to the Town's sewer plan" was disingenuous, as explained above. Finally, again, sewers are public utilities to which property owners have access. For these reasons, the WPCA had an administrative obligation to approve the application.

## VII. IN THE ALTERNATIVE, THE WPCA'S DENIAL REASONS WERE PRETEXTUAL, AND ITS ACTUAL REASONS WERE ILLEGAL.

An agency's reason for action is pretextual when the record shows that it was not, or probably was not, the actual reason. The Commission's denial here was a pretext for the actual reasons, which was to stop the proposed land use. *See, e.g., Cambodian Buddhist Soc'y of CT., Inc. v. Plan. & Zoning Comm'n*, 2005 WL 3370834, at *13 (Conn. Super. Ct. Nov. 18, 2005) (A20), *aff'd* 285 Conn. 381 (2008) (explaining that commission's reliance on technicalities in the regulations to prevent development was pretextual and improper); *Town Close Assocs. v. Plan. & Zoning Comm'n*, 42 Conn. App. 94, 105 (1996) (highlighting pretextual nature of commission's argument that C.G.S. § 8-30g balancing test should not apply to a site already zoned for affordable housing); *Greens Farms Devs., LLC v. Historic Dist. Comm'n*, 2019 WL 2371894, at *5 (Conn. Super. Ct. Apr. 29, 2019) (A33) (concluding that commission's basis for denial was pretextual and, therefore, illegal and arbitrary).

Here, as shown above, the stated reasons – the availability of the private easement, and the maintenance obligation – are contrary to the record, and the actual reason was illegal. In *AvalonBay*, this Court stated that a water pollution control authority may not use its power to deny sewer service as a means of controlling land use. *See* 270 Conn. at 433 n.26. It is "questionable," this Court observed, whether a WPCA "can arbitrarily refuse to extend sewers

just to prevent development otherwise recognized by the zoning regulations, and denial of an extension would have to be based on topographical or engineering considerations, the terms of the sewer ordinance, a prior schedule for specific sewer extensions, or similar standards." *Id.* The "power to determine what are the needs of a town with reference to the use of the real property located in it and to legislate in such a manner that those needs will be satisfied is, by statute, vested exclusively in the zoning commission." *Dauti Constr.*, 125 Conn. App. at 662. "The legislature has not authorized water pollution control authorities to exercise those zoning powers." *Id.* at 663. Only zoning commissions may control land use. *Harris*, 259 Conn. at 425.

Here, the WPCA's denial was transparently an effort to control land use. It denied the sewer application because of public opposition to the proposed housing. Whether that opposition was rooted in the proposal including 30 percent affordable housing (or mistakenly assuming 100 percent of the units would be affordable housing) is unknown because, of course, the stated opposition contained not one word about affordable housing – only numerous, lightly-veiled references that can only be interpreted as stereotypes about affordable housing residents, such as the repeated references to *the housing* – the residents thereof – altering "the character of the town."[19] The denial was plainly a response to public opposition to the housing proposal. Thus, the stated reasons were not the actual reasons, and the actual reasons were *ultra vires*, unsupported, and illegal.

## VIII. IN THE ALTERNATIVE, IF THE WPCA HAD DISCRETION OVER A SEWER EXTENSION, ITS EXERCISE OF THAT DISCRETION WAS ARBITRARY.

In *AvalonBay*, 270 Conn. 409, the Court recognized that WPCAs have discretion to approve sewer extensions, but cautioned that such discretion may not be exercised arbitrarily or illegally. Without belaboring the facts and law set forth above, even if this application proposed an "extension," the WPCA had no factual or legal basis to deny it.

## IX. RELIEF AND CONCLUSION.

[19] In Public Act 21-29, the legislature banned use of "character of the town" as a denial reason in zoning applications except when it refers to structural or physical characteristics of buildings in a district.

The WPCA's positions about a WPCA retaining discretion over sewer extensions even when all objective criteria have been met, work an insidious result. Allowing elected bodies like the PZC to veto regulatory-compliant sewer applications is a recipe for unappealable exclusion of multi-family and affordable housing and avoidance of judicial review. Sewer service is usually essential for multi-family and affordable housing development, and the WPCA's attempt to call this application an extension and use a PZC § 8-24 referral to claim "discretion" over the extension, is an exclusionary land use technique. This Court should reject this effort.

In *Thorne v. Zoning Board*, 179 Conn. 198 (1980), the Court held that if an application presents only one feasible and legal outcome for an administrative agency, a reviewing court should order that result rather than remand. Here, there was only one potential outcome, an approval, which this Court is not only empowered but directed to by the facts in the Record and caselaw.

The plaintiffs respectfully ask that the appeal be sustained and the defendant WPCA be directed to approve the application as filed April 14, 2022 and as revised to July 12, 2022.

CO-PLAINTIFFS,
751 WEED STREET LLC, AND W.E. PARTNERS, LLC

By *_/s/ Timothy S. Hollister_*

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CERTIFICATION OF SERVICE

I hereby certify that the foregoing Brief and Appendix were electronically delivered this 16th day of December, 2022, to all parties listed below and written consent for electronic delivery has been received from all parties.

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*/s/ Timothy S. Hollister*
Timothy S. Hollister
Commissioner of the Superior Court

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| NO. HHD-CV22-6160099-S | : | SUPERIOR COURT |
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| | : | |
| 751 WEED STREET, LLC AND W.E. PARTNERS, LLC | : | JUDICIAL DISTRICT OF HARTFORD |
| | : | |
| | : | |
| v. | : | |
| | : | |
| TOWN OF NEW CANAAN WATER POLLUTION CONTROL AUTHORITY | : | |
| | : | |
| | : | DECEMBER 16, 2022 |

# APPENDIX TO BRIEF OF PLAINTIFFS 751 WEED STREET, LLC AND W.E. PARTNERS, LLC

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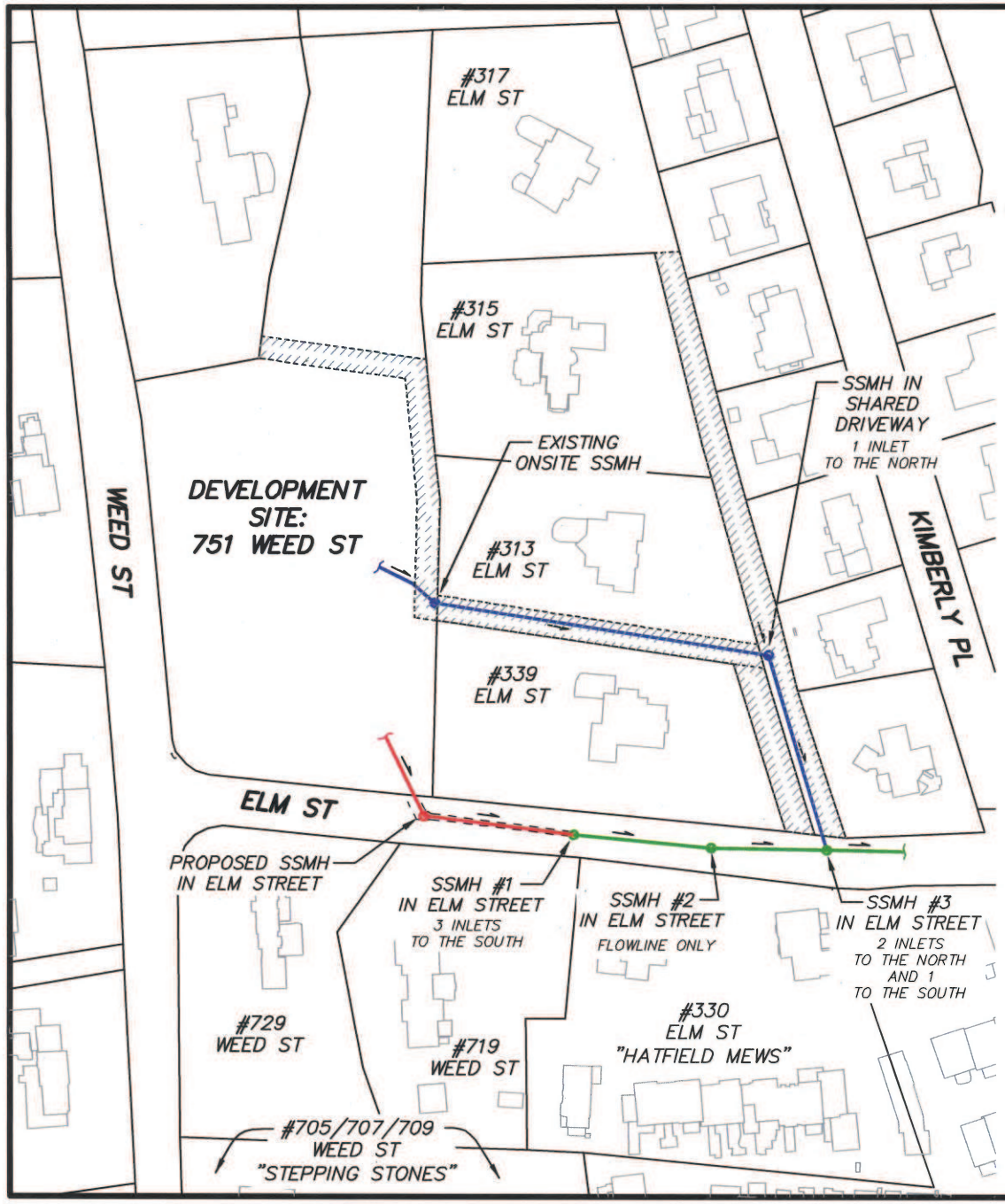



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# EXHIBIT A:
# DIAGRAM OF LATERAL RELOCATION

NOTES:

1. The sanitary sewer manholes were surveyed and inspected by D'Andrea Surveying & Engineering, P.C. Refer to the civil plans for more information.
2. The sanitary sewer easement is taken from Map No. 6892 N.C.L.R.
3. Property lines and offsite buildings taken from GIS data.
4. Properties labeled with addresses are assumed to connect to the sewer infrastructure depicted on this plan.

EXISTING SEWER MAIN IN ELM STREET

EXISTING SEWER LATERAL THROUGH EASEMENT

PROPOSED SEWER LATERAL RELOCATION IN ELM STREET

SANITARY SEWER EASEMENT

N

**SCALE: 1" = 150'**

A1

KeyCite Yellow Flag - Negative Treatment
Declined to Extend by Toll Bros., Inc. v. Township of Moorestown, N.J.Super.A.D., September 18, 2006

174 N.J. 301
Supreme Court of New Jersey.

BI–COUNTY DEVELOPMENT OF CLINTON, INC., a New Jersey Corporation, Plaintiff–Appellant,
v.
BOROUGH OF HIGH BRIDGE, a municipal corporation of the State of New Jersey and State of New Jersey, Defendants–Respondents,
and
Clinton Township Sewerage Authority, a New Jersey Public Utility, Defendants.

Argued Feb. 11, 2002.
|
Decided Aug. 5, 2002.

**Synopsis**

Developer that was building residential and commercial units in one township brought action against adjoining municipality, local sewerage authority, and state to compel them to allow developer to connect sewer lines from development to adjoining municipality's sewer system. The Superior Court, Law Division, Hunterdon County, granted summary judgment in favor of developer against municipality. Municipality appealed. The Superior Court, Appellate Division, Skillman, P.J.A.D., 341 *N.J.Super.* 229, 775 *A.*2d 182, reversed and remanded. Certification was granted. The Supreme Court, Stein, J., held that developer could not compel an adjoining municipality to allow it to connect into its municipal sewer system, even though the developer paid money into the township's affordable housing fund.

Affirmed as modified.

Verniero, J., dissented and filed opinion joined by Long, J.

**Procedural Posture(s):** On Appeal; Motion for Summary Judgment.

West Headnotes (4)

[1] **Municipal Corporations** Nonresidents

As a general rule, a municipality that provides sewage services for the benefit of its residents is under no obligation to extend its services to those beyond its borders. N.J.S.A. 40A:26A–2.

2 Cases that cite this headnote

[2] **Municipal Corporations** Nonresidents
**Water Law** Right and duty to supply in general

A municipality is not compelled to serve non-residents in the absence of its voluntary undertaking to provide sewer and water service, notwithstanding the public utility aspect of the service provided. N.J.S.A. 40A:26A–2.

1 Case that cites this headnote

[3] **Municipal Corporations** Nonresidents

Developer that paid money into a township's affordable housing fund instead of constructing housing units for lower income households could not compel an adjoining municipality to allow it to connect into municipal sewer system, regardless of whether the development was inclusionary; developer had alternative, but more expensive, means of acquiring sewer service, compelling municipality to allow the connection would not facilitate the construction of lower income housing, but would only lower the developer's costs and increase the potential profits, and payment of the development fee thus lacked a sufficient nexus to the actual production of low-income housing to justify infringing on another municipality's right to restrict access to its sewer system.

7 Cases that cite this headnote

[4] **Municipal Corporations** Nonresidents

Under *Mount Laurel* principles on the constitutional obligation to provide a realistic

opportunity for the development of low and moderate income housing, compelling circumstances should exist in order to justify disturbing the general rule that a municipality may exclude another municipality or its residents from using or connecting to its sewer system.

8 Cases that cite this headnote

**Attorneys and Law Firms**

****434** ***302** Carl S. Bisgaier, Cherry Hill, argued the cause for appellant (Flaster/Greenberg, attorneys; Mr. Bisgaier and Sharon A. Morgenroth, on the briefs).

Valerie K. Bollheimer, Bedminister, argued the cause for respondent (Purcell, Ries, Shannon, Mulcahy & O'Neill, attorneys).

***303** Daren R. Eppley, Deputy Attorney General, submitted a letter in lieu of brief on behalf of respondent State of New Jersey, Department of Environmental Protection (David N. Samson, Attorney General of New Jersey, attorney).

William P. Malloy, Deputy Attorney General, submitted a brief on behalf of amicus curiae, Council on Affordable Housing (David N. Samson, Attorney General of New Jersey, attorney; Douglas K. Wolfson, Assistant Attorney General, of counsel).

**Opinion**

The opinion of the Court was delivered by

STEIN, J.

The issue before the Court is whether a developer that pays money into a municipality's affordable housing fund instead of constructing housing units affordable to lower income households may compel an adjoining municipality to allow it to connect into its municipal sewer system.

The Law Division granted summary judgment in favor of plaintiff, Bi–County Development of Clinton, Inc. (Bi–County), holding that Bi–County's proposed development qualified as an inclusionary development and that the refusal of defendant, Borough of High Bridge (High Bridge), to permit access to its sewer system had a cost generating impact on the development. Therefore, it determined that High Bridge was obligated to permit Bi–County access to its sewer system. The Appellate Division reversed the judgment of the trial court and held that payment of a development fee in lieu of constructing low and moderate income housing does not entitle Bi–County to connect into a neighboring municipality's sewer system.

We affirm the judgment of the Appellate Division. We hold that payment of a development fee in lieu of constructing affordable housing does not justify disturbing the general rule that a municipality is not obligated to provide access to its sewer system to residents of a neighboring municipality.

***304** I

A

Bi–County is the owner and developer of a 46.2 acre parcel of land located near the intersection of State Highway No. 31 (Route 31) and County Road No. 513 (Route 513) in Clinton Township, New Jersey. There is direct access to Route 31 along the easterly side of the property. On the north, west and south sides of the property is the Spruce Run Reservoir Recreation Area, owned and operated by the State of New Jersey (State).

Bi–County's parcel is identified as Block 68, Lot 9, on the tax map of Clinton Township. At the time Bi–County acquired the property it was zoned to permit residential development of eight units per acre. Following a builders remedy lawsuit initiated by Bi–County, the property since has been zoned by the Township for an "inclusionary development" pursuant to the Township's certified Housing Element and Fair Share Plan (HE/FSP). Bi–County has received preliminary subdivision approval from the Planning Board of Clinton Township (Planning Board) permitting the development of 187 single family residential units. Subsequently, Bi–County has proposed ****435** construction of only 105 single family units with 10,000 square feet of land reserved for a commercial component of the development.

Defendant High Bridge, Clinton Township, and the Town of Clinton are neighboring municipalities. High Bridge, through its Department of Public Works, owns and operates a sewage conveyancing system that includes a sewage pumping station located on Route 513. Sewage is pumped through a force main that transmits effluent from High Bridge to the Town of Clinton Collection System where it flows to the Town of

Clinton Sewage Treatment Plant (STP). In 1968, High Bridge contracted with the Town of Clinton to allow it to send its sewage to the Town of Clinton STP.

The State owns and operates a sewage transmission line, including a pumping station, that conveys sewage from the Spruce Run Reservoir Recreation Area to the High Bridge sewer system. ***305** That transmission line runs directly along the frontage of Bi–County's property proceeding in a southerly direction along Route 31 to the intersection of Route 513. The sewer line then proceeds in an easterly direction along Route 513 to a connection point with the High Bridge system. In 1970, the State and High Bridge entered into an agreement whereby the State was permitted to connect its Spruce Run sewer line into High Bridge's line that eventually empties into the Town of Clinton STP.

In order for Bi–County's proposed development to be constructed, Bi–County must obtain sufficient sewage treatment capacity as well as a connection to a sewage treatment facility. As a result of prior litigation, the Town of Clinton STP will provide 56,100 gallons per day (gpd) of sewage treatment capacity for the Bi–County development. Although originally planning to construct its own sewer line to connect to the Town of Clinton STP, which may have required constructing a new pumping station as well, Bi–County now proposes as an alternative that it use available sewer capacity in the State owned sewer line and the High Bridge system.

B

In October of 1985, pursuant to the Fair Housing Act, *N.J.S.A.* 52:27D–309(a), Clinton Township (Clinton) timely filed a Resolution of Participation with the Council on Affordable Housing (COAH) and, on December 31, 1986, filed its first Housing Element and Fair Share Plan. Clinton included Bi–County's property in its HE/FSP as a site for inclusionary development. However, Clinton did not petition for substantive certification at that time.

In July of 1987, Bi–County initiated an exclusionary zoning builder's-remedy lawsuit, challenging Clinton's compliance with its Mount Laurel obligation and alleging that Clinton had 1) failed to act on Bi–County's preliminary site plan application that included an affordable housing set aside; 2) failed to adopt the necessary ordinances consistent with its HE/FSP; and 3) failed to seek COAH review for substantive certification. In November 1987, ***306** Bi–County's motion to transfer the case to COAH's jurisdiction in order to exhaust the mediation and review process pursuant to *N.J.S.A.* 52:27D–316(b) was granted and the matter was transferred to COAH by court order.

In early 1987, Clinton apparently became aware of potential problems with the construction of a large development on the Bi–County site. A committee was formed to investigate the issue and to amend the HE/FSP accordingly. On December 1, 1987, the Planning Board approved a resolution amending its Master Plan and recommending amendments to the Municipal ****436** Zoning Ordinance. On December 3, 1987, Clinton filed an amended HE/FSP deleting the Bi–County site as a component of its affordable housing plan. With regard to the ongoing builder's remedy suit, a dispute arose about which of the two filed plans should be subject to the mediation before COAH. However, in March 1988, COAH issued an Order and decided that the plan on file when Bi–County's case was transferred from the courts, the initial HE/FSP, was subject to the mediation.

COAH ultimately transferred the case to the Office of Administrative Law (OAL) for review. The matter was eventually resolved when both parties executed a comprehensive thirty-two page Settlement Agreement (Agreement) in September 1990. The Agreement provided that Bi–County could develop its parcel with "up to one hundred eighty-seven (187) residential units and up to ten thousand (10,000) square feet of commercial and/or office space." The Agreement further provided Bi–County the option either to seek approval for "an on-site set aside for affordable housing of ten percent (10%) of the total units (evenly distributed between low and moderate units)" or,

> [a]lternatively, at Bi–County's sole discretion, [it could make a] Contribution to the Township of Two Thousand Dollars ($2,000) for each of the up to 187 market rate units to be approved by the Planning Board pursuant to this Agreement, to be used by the Township for the satisfaction of its *Mt. Laurel* obligation to provide low and moderate income housing off-site by means of such COAH approved mechanisms as rehabilitation of existing units or

> Regional Contribution Agreements pursuant to *N.J.S.A.* 52:27D–312.

***307** That contribution, if Bi–County elected the contribution plan, would be its sole responsibility concerning Clinton's *Mount Laurel* obligation. Furthermore, the agreement provided that "the Contribution in lieu of an on-site set aside, ... shall be used by the Township solely for the creation of a realistic housing opportunity for low and moderate income households consistent with COAH regulations and subject to COAH approval."

Also included in the Agreement was the parties' recognition of COAH's Scarce Resource Order, entered in January 1988, when COAH determined that sewer capacity in the Township of Clinton was "of limited supply and a durational adjustment might be required as a result of inadequate sewer capacity." (A durational adjustment is a deferral of a "municipality's fair share obligation due to the lack of adequate public facilities and infrastructure capacity." *N.J.A.C.* 5:92–8.5(a).) The parties further noted that "COAH's durational adjustment regulations require municipal cooperation in obtaining adequate sewer capacity." See *N.J.A.C.* 5:92–8.5(c–f) and 5:92–8.6(c). Therefore, Clinton agreed "to take such action as is reasonable, appropriate and necessary to assist Bi–County in obtaining such access and treatment capacity and otherwise diligently support and cooperate with Bi–County in its efforts to achieve sewer treatment and capacity." The Township also agreed to assign all its rights under a contract with the Town of Clinton regarding sewer capacity to Bi–County. Moreover, if Bi–County was unable to reach agreements with private parties, the Township also agreed to "use its power of eminent domain to procure necessary water and/or sewer easements to reduce reasonably the cost of providing the necessary infrastructure to the Bi–County Tract and the development contemplated by this Agreement." The Township further agreed to expedite applications for site plan approval relevant to the Bi–County property and to cooperate ****437** with Bi–County to facilitate the construction of the development.

In October 1990, the terms of the Agreement were incorporated into Clinton Ordinance No. 436–90, including the limitation of the ***308** development of the tract not to exceed 187 units, and the requirement of a ten percent set aside or a "cash contribution in the amount of $2,000 per approved dwelling unit, to be used for the development, redevelopment or rehabilitation of low and moderate income housing within Clinton Township, or through a Regional Contribution Agreement approved by the Council on Affordable Housing." In addition, Bi–County's property was located in the newly designated AH–3 (Affordable Housing District) zone, permitting single family residences on 5,000 square foot lots with public water and public sewer.

In April 1991, Clinton adopted a new HE/FSP and in August 1991 submitted it to COAH for review and substantive certification. The plan included the designation of the Bi–County tract as a potential affordable housing site along with two other sites designated AH–1 and AH–2. It also recognized the Agreement terms by which Bi–County was entitled to build up to 187 residential units and had the option either to construct affordable units equal to ten percent of the total number of units constructed or, in lieu of construction, to contribute $2,000 for each market rate unit to be used by the Township to satisfy its fair share housing obligation.

In February 1993, COAH granted Clinton substantive certification. In its report, COAH recognized the Bi–County tract as an inclusionary site along with two other sites, AH–1 and AH–2. However, it also noted Bi–County's option to build nineteen low and moderate income units (ten percent of 187) or provide a development fee in lieu of constructing those units. Reporting that Clinton's low and moderate income housing need was for 233 units, 58 to be rehabilitated and 175 units to be newly constructed, COAH contemplated that those units would be constructed only on the AH–1 and AH–2 sites in assessing Clinton's plan for complying with its *Mount Laurel* obligation.

COAH also recognized Clinton's problem regarding sewage treatment facilities, namely, that Clinton Township did not have a treatment plant, noting that the AH–2 and Bi–County sites eventually ***309** were to be "sewered and served by the [Town of] Clinton treatment plant." COAH also noted that the Town of Clinton STP was completing design plans to remedy deficiencies related to water quality standards.

As noted, in order to preserve treatment capacity for future affordable housing needs COAH had issued a Scarce Resource Order that was still in effect at the time of the substantive certification of Clinton's HE/FSP. In granting substantive certification, COAH included a durational adjustment "which will remain in effect until adequate wastewater treatment capacity becomes available to serve the AH–2 and AH–3 inclusionary sites." COAH also recognized Clinton's commitment pursuant to the Agreement

reasonably to assist Bi–County in resolving the treatment capacity problem.

In April 1994, the Planning Board granted preliminary major subdivision approval for the Bi–County development project. In its approval, the Planning Board noted that pursuant to the Agreement Bi–County chose to contribute the sum of $2,000 for each market rate unit it constructed in lieu of actual construction of low and moderate income housing units. Although that decision was solely within Bi–County's discretion, Clinton apparently had requested Bi–County to make that payment rather than construct low income housing. The Planning Board also noted that if Bi– **438 County constructed 187 market rate units as indicated in its current plan, then Bi–County's total monetary contribution would be $374,000.

Listed as one of the unresolved issues before final approval would be granted was public water and sewer capacity for the Bi–County development. Bi–County had reported that it would obtain public water from the Town of Clinton and sewer capacity from the Clinton Township Sewerage Authority (CTSA). Significantly, the Planning Board noted that Bi–County would have to "bring sewer and water lines down Route 31 to Halstead Street in order to service the project." The Planning Board also stated that "[a]ny approval granted by this Board will be contingent upon *310 the applicant [Bi–County] obtaining unconditional approval from the Clinton Township Sewerage Authority and Town of Clinton Public Works" to gain access to their public water and sewer capacities.

Although Bi–County clearly contemplated constructing sewer lines along Route 31 to connect with the Clinton system, Bi–County was unable amicably to obtain sewerage treatment capacity for the proposed development. Therefore, in October 1994, Bi–County instituted litigation against the Town of Clinton to obtain the necessary reservation of sewer treatment capacity. The outcome of that litigation was a court order entered January 31, 1997, requiring the Town of Clinton to reserve for the benefit of the Bi–County development 56,100 gallons per day of sewage treatment capacity at the Clinton STP.

Although that litigation apparently resolved the issue of transmitting sewage from the proposed Bi–County development to the Clinton STP, Bi–County subsequently developed an alternative plan in order to avoid construction of a new sewer line along Route 31 as it had originally planned. Bi–County sought instead to gain access to the State sewer conveyancing system that runs south on Route 31 and west on Route 513 to the High Bridge sewage conveyancing system that eventually empties into the Clinton STP.

The State at first was reluctant to cooperate, but eventually indicated that it would be willing to permit Bi–County to gain access to its line pursuant to an agreement whereby CTSA would take over the line's ownership and maintenance. The CTSA tentatively agreed to take over the line subject to its own conditions. However, Bi–County was unsuccessful in its efforts to obtain access to the High Bridge sewer system. In 1998, Bi–County filed the present action seeking declaratory and injunctive relief against High Bridge, the CTSA, and the State.

Bi–County seeks access to the High Bridge sewer system to convey sewage from the proposed development on its property through the State line to and through the High Bridge sewer *311 system to the Clinton STP for treatment. Bi–County asserts that the only alternative to achieve public water and sewage capacity for its proposed development would be to use the access it obtained through litigation to the Clinton STP by constructing an entirely new pumping station on its property and a new force main line that would run one mile in length parallel to the State line along Route 31 and continue parallel to the High Bridge line to a connection point in the Town of Clinton on Halstead Street. Bi–County claims that that alternative would be expensive, time consuming, unnecessarily duplicative of the High Bridge connection and unduly cost-generative. Plaintiff's experts estimate that it would cost Bi–County $676,830 to build the new line and pumping station. In comparison, the cost to connect to the High Bridge system would be only $13,750. Bi–County further asserts that High Bridge's **439 system has excess capacity that could accommodate anticipated sewage flow from the proposed Bi–County development, and submitted an expert report to that effect. However, High Bridge submitted its own expert report concluding that costly improvements to the High Bridge system were necessary to accommodate the anticipated flow from the Bi–County development. Another expert report submitted by the CTSA reached a similar conclusion. [1]

1 Bi–County has since submitted an amended subdivision application reducing the number of residential units it intends to construct to 105. Under that plan, Bi–County is required to build eleven affordable units or make a payment in lieu of

> $210,000, and the amount of expected sewage flow from the revised development plan is 32,500 gpd.

Bi–County's legal argument is that it is an "inclusionary" development and that, as such, High Bridge has an obligation to eliminate any "undue cost generating practices" pursuant to the Fair Housing Act and COAH regulations. High Bridge argues that the Bi–County development is not entitled to any such preferential treatment. It asserts that because Bi–County is building in Clinton, High Bridge has no obligation to minimize its costs, and also notes that Bi–County does not intend to construct ***312** any low or moderate income housing, but merely contemplates a monetary contribution.

In September 1999, the trial court granted Bi–County's motion for summary judgment and ordered High Bridge to permit Bi–County access to its sewage conveyancing system, provided that an agreement is reached between the State and the CTSA regarding transfer of the State's sewer line. The trial court, relying on *Holmdel Builders Association v. Township of Holmdel*, 121 *N.J.* 550, 572–76, 583 *A.*2d 277 (1990), held that Bi–County's development "qualifies as an inclusionary development," stating:

> [I]t should be noted that [Bi–County's] development is part of a Mount Laurel settlement, a COAH-approved compliance plan, and it generates funds for affordable housing purposes. It was in response to the request by Clinton Township that plaintiff agree[d] not to construct affordable units on tract, and in lieu thereof to provide a financial contribution.

The court found that there was a very substantial cost differential to Bi–County if it were required to construct a new line as opposed to using the State line and the High Bridge system. The court also found that the significant costs of constructing a new line were "undue expenses because they are unnecessary. Health and safety issues are not implicated."

Finally, the court concluded:

> The record demonstrates that the refusal of the defendants to cooperate with plaintiff to enable the Bi–County property to connect to the State line and the High Bridge conveyancing system would have an undue cost-generative impact on this inclusionary development.

Because the court found that the High Bridge system had the capacity to accommodate the anticipated sewerage flow from the Bi–County development, the court concluded that there was no reason for High Bridge not to cooperate with Bi–County.

On appeal, High Bridge argued that (1) Bi–County was not an inclusionary developer entitled to preferential treatment simply because it made a monetary contribution in lieu of actually constructing affordable housing; and (2) that the trial court erred in determining that there were no contested facts concerning the capacity of the High Bridge system to accommodate increased flow from the Bi–County development.

****440** ***313** The Appellate Division reversed the trial court's summary judgment in favor of Bi–County, concluding that a developer that pays money into a municipality's affordable housing fund in lieu of constructing units affordable to low and moderate income households does not have a right to connect into the sewer system of an adjoining municipality that has "elected to reserve the use of its system for its own residents." *Bi–County v. Borough of High Bridge*, 341 *N.J.Super.* 229, 231, 775 *A.*2d 182 (2001). That determination made it unnecessary for the court to decide whether there was a genuine issue of material fact concerning the capacity of the High Bridge system to accommodate the flow from the Bi–County development or whether the denial of access to the system imposed undue costs upon Bi–County. *Id.* at 235, 775 *A.*2d 182.

The court observed that to compel High Bridge to provide access to its system to Bi–County would not "facilitate the construction of lower income housing." *Id.* at 237, 775 *A.*2d 182. Rather, it would "only lower the costs and thereby increase the potential profits from a development of single family homes and a commercial building." *Ibid.* The court noted that although "Bi–County's payment of a development fee to Clinton presumably will assist in the construction of lower income housing somewhere, this does not mean that Bi–County's development should be considered a residential

development for lower income households [that] may demand that a municipal government minimize its development fee and costs." *Id.* at 237–38, 775 *A.*2d 182. The court reasoned that "if we were to hold that this payment entitles Bi–County to connect its proposed sewer system into High Bridge's sewer system, any other developer who pays a development fee to a municipal affordable housing fund pursuant to a development fee ordinance could claim similar entitlement." *Id.* at 239, 775 *A.*2d 182.

The court further noted Bi–County's reliance on this Court's statement in *Holmdel,* that " 'development fees are the functional equivalent of mandatory set-aside schemes authorized by *Mount Laurel II* and the FHA.' " *Id.* at 239–40, 775 *A.*2d 182 (quoting *Holmdel, supra,* 121 *N.J.* at 576, 583 *A.*2d 277). However, the ***314** Appellate Division explained that that reliance was misplaced because the Court's statement was intended to explain "its conclusion that the FHA impliedly authorizes the adoption of a development fee ordinance as part of a municipal *Mount Laurel* compliance plan." *Id.* at 240, 775 *A.*2d 182 (referring to *Holmdel, supra,* 121 *N.J.* at 566–80, 583 *A.*2d 277). The Appellate Division emphasized that "the Court did not say that any developer [who] pays a development fee pursuant to such an ordinance has the same right to insist upon the elimination of any 'undue cost generating' expenses as an actual developer of lower income housing," and characterized a development for which the developer has paid a fee in lieu of constructing low income housing as a "non-inclusionary residential property." *Ibid.* (citing *Holmdel, supra,* 121 *N.J.* at 571–73, 583 *A.*2d 277). The court further stated that *Bi–County's* interpretation of *Holmdel* "distorts the Supreme Court's rationale for upholding the validity of development fees and the *Mount Laurel* doctrine." *Ibid.*

Finally, the Appellate Division found that pursuant to the Fair Housing Act, *N.J.S.A.* 52:27D–304(f), and COAH regulation *N.J.A.C.* 5:93–1.3, the designation of a residential property as an "inclusionary development" requires the construction of housing units affordable to moderate and low income households. *Id.* at 240–41, 775 *A.*2d 182. Therefore, the court concluded that Bi–County's obligation to pay into ****441** Clinton's affordable housing fund "does not transform its proposed development into an 'inclusionary development' that can assert a right to compel an adjoining municipality to allow the developer to connect into its municipal sewer system." *Id.* at 241, 775 *A.*2d 182.

This Court granted Bi–County's petition for certification. *Bi–County Development of Clinton, Inc. v. Borough of High Bridge,* 170 *N.J.* 387, 788 *A.*2d 772 (2001).

C

Subsequent to oral argument, this Court requested the New Jersey Attorney General's Office to submit an *amicus curiae* brief on behalf of COAH addressing the following questions:

***315** 1) Whether COAH considers a project to be "inclusionary" when payments are made by the developer in lieu of actually constructing affordable housing, and

2) Whether COAH views the FHA and its implementing regulations as permitting an inclusionary development to demand access to a neighboring community's water/sewer system if such access will result in substantial cost savings while presenting no public health or safety concerns to the neighboring community.

COAH responded that it considers a project to be inclusionary when payments are made by the developer in lieu of constructing affordable housing for the purposes of its administration of *Mount Laurel* obligations. However, COAH responded that it lacked the jurisdiction to decide whether an inclusionary developer in one municipality can compel another municipality to allow access to its sewer system and declined to take any position on that issue.

We also note that in April 2002, High Bridge filed a motion to dismiss the appeal. High Bridge claimed that the appeal had been rendered moot because Bi–County had sold the subject property on January 10, 2002, and that therefore Bi–County lacked standing in the litigation. Bi–County asserts that its contract of sale provides for additional compensation if it prevails in the matter at hand, and that accordingly it retains a financial stake in the litigation. The Court denied High Bridge's motion to dismiss the appeal, concluding that Bi–County's contractual right to additional compensation if it prevails prevents the sale from rendering the appeal moot.

II

A

[1] The Legislature has authorized "municipalities and counties either separately or in combination with other municipalities and counties to finance, acquire, construct, maintain, operate or improve works for the collection, treatment, transport and disposal of sewage and to provide for the financing of these facilities." *N.J.S.A.* 40A:26A–2. Counties or municipalities are authorized to charge rates to users of the sewer services they provide as well as connection fees. *See N.J.S.A.* 40A:26A–10–11. Municipalities may impose special assessments for local improvements such as ***316** sewage and water, *N.J.S.A.* 40:56–1, and *N.J.S.A.* 40A:26A–14 specifically provides that a governing body "shall assess the costs and expenses of the sewerage facilities on the lands specially benefited therefrom in proportion to the benefits received." However, that statutory scheme does not require a municipality to provide sewage services to anyone other than its residents and, as a general rule, a municipality that provides services for the benefit of its residents is under no obligation to extend its services to those beyond its borders. *Mongiello v. Borough of* ****442** *Hightstown,* 17 *N.J.* 611, 614–19, 112 *A.*2d 241 (1955).

[2] In *Mongiello,* the Court held that the "Borough of Hightstown was under no duty to supply water from its municipal water supply system to the plaintiff, a resident of the adjoining Township of East Windsor." *Id.* at 612, 112 *A.*2d 241. The Court explained that the Legislature had expressly authorized municipalities to provide water for their inhabitants and, if they so chose, to execute contracts to provide water to non-residents. *Id.* at 615, 112 *A.*2d 241. However, a municipality is not compelled to "serve non-residents in the absence of its voluntary undertaking," *id.* at 616, 112 *A.*2d 241, and that principle applies notwithstanding the public utility aspect of the service provided. *Ibid.* (citing *Valcour v. Village of Morrisville,* 104 *Vt.* 119, 158 *A.* 83, 86–87 (Vt.1932))(recognizing town's authority to dispose of surplus electricity to non-residents but that relationship is purely contractual); *Richards v. City of Portland,* 121 *Or.* 340, 255 *P.* 326, 329 (Or.1927)(recognizing that water system was established at taxpayers' expense and "a holding that those who have not borne such burden shall have equal rights therein would not be based on sound equitable principles"). We observed in *Mongiello* that

> [a] municipal water system should be so operated as to serve effectively the municipality and its residents; if non-residents can incidentally be served as an accommodation and without endangering the local service all well and good; but such incidental service to non-residents may not fairly be converted into an obligation to render additional non-resident service tending to jeopardize the service within the municipality.
>
> [*Id.* at 618, 112 *A.*2d 241 (citation omitted).]

***317** Bi–County relies on two cases, *Dynasty Building Corp. v. Borough of Upper Saddle River,* 267 *N.J.Super.* 611, 632 *A.*2d 544 (App.Div.1993), and *Samaritan Center, Inc. v. Borough of Englishtown,* 294 *N.J.Super.* 437, 683 *A.*2d 611 (Law Div.1996), to assert that High Bridge is obligated to provide access to its sewer system because it is required to eliminate any "undue cost generating practices" that may prevent Bi–County's development from being constructed.

After a successful builder's remedy suit was brought by the plaintiff, Dynasty Building Corporation (Dynasty), against the Borough of Upper Saddle River, the trial court entered a judgment approving a compliance plan that included the building of 119 low and moderate income housing units on Dynasty's property in Upper Saddle River. *Dynasty Building Corp., supra,* 267 *N.J.Super.* at 614, 632 *A.*2d 544. The plan contained a provision requiring the defendant-intervenor, the Borough of Ramsey (Ramsey), to " 'revise and update their intermunicipal agreement governing the providing of sewer service by Ramsey ... to accommodate Upper Saddle River's Compliance Plan consistent with the decision of the Court.' " *Ibid.* Ramsey owned the primary interest in a sewer system that served Ramsey, Allendale and a portion of Upper Saddle River. *Id.* at 615, 632 *A.*2d 544. Ramsey appealed from the judgment based on the adverse impact that the compliance plan would have on the Ramsey community, specifically the impact on its sewer system. Based on an expert's report, the trial court concluded that there was sufficient sewer capacity available to serve the Dynasty development and "other, later included, tracts." *Id.* at 616, 632 *A.*2d 544.

The Appellate Division affirmed the trial court's decision, holding that "[i]ssues of cost-bearing responsibility aside, an order ****443** requiring Ramsey to make existing sewer capacity available to *Mt. Laurel* inclusionary development sites comports with the concept that municipal obligations to provide for low and moderate income housing are established on the basis of regional responsibility." *Ibid.* (citing *Southern Burlington County N.A.A.C.P. v. Township* ***318** *of Mount Laurel,* 92 *N.J.* 158, 208, 456 *A.*2d 390 (1983)) (*Mount Laurel II*); *Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel,* 67 *N.J.* 151, 179–80, 336 *A.*2d 713 (1975), *cert. denied,* 423 *U.S.* 808, 96 *S.Ct.* 18, 46 *L.Ed.*2d 28 (1975), (*Mount Laurel I*). However, because the Appellate Division determined that Ramsey had not been afforded an

opportunity to demonstrate the impact of the compliance plan on its sewer system, it remanded the issue of "whether sufficient sewer service and capacity exists to serve those inclusionary sites [that] require access to Ramsey's sewer system" for an evidentiary hearing, "followed by findings and such modifications in the compliance plan and judgment as may be necessary." *Id.* at 617.

In *Samaritan Center, Inc., supra,* 294 *N.J.Super.* at 440, 683 *A.*2d 611, the Law Division directly addressed the question whether a municipality has "any obligation to facilitate, if not assist, the development of low and moderate income housing in a neighboring municipality." One of the plaintiffs, Samaritan Center, Inc. (Samaritan), was a non-profit organization that provided housing for low-income persons in western Monmouth County. The Township of Manalapan donated public lands to Samaritan for the purpose of building eighty-seven single family homes, of which sixty-seven were restricted for low and moderate income housing needs. The other plaintiff, Tracey Station Associates, was the owner of property within the same township and had acquired development approvals arising from a final Mount Laurel Consent Order to construct 140 townhouses, of which twenty percent or twenty-eight units were reserved for low and moderate income housing. *Id.* at 441, 683 *A.*2d 611. The plaintiffs had entered into an agreement to share costs of water and sewer service to their sites located within close proximity to each other.

The plaintiffs sought a mandatory injunction compelling the defendant, the Borough of Englishtown (Englishtown), to permit access to its water and sewer lines. Specifically, the plaintiffs wanted to connect to a sewer line located about 1,700 feet from the Tracy Station property and owned and operated by Englishtown. ***319** The Englishtown sewer line connected to the sewer lines of Western Monmouth Utilities Authority (WMUA) for "ultimate treatment at its regional facility." *Id.* at 443, 683 *A.*2d 611. The only other way for the plaintiffs to connect to the sewer service provided by WMUA was to construct a 6,200 foot connection line and negotiate various access easements. Similarly, plaintiffs sought a connection to their water supplier, Gordon's Corner Water Company, through Englishtown's backup water line. Otherwise, they would have had to connect directly to the Gordons' Corner water line by constructing another line and possibly a pumping station, "which construction [was] apparently not acceptable to the utilities authority." *Id.* at 442, 683 *A.*2d 611. Connecting to both water and sewer services through the Englishtown lines would result in an estimated cost savings of $412,888. *Id.* at 443, 683 *A.*2d 611.

The court recognized, as the plaintiffs asserted, that there was "a more significant problem than the need to simply control expenses for the housing projects." *Ibid.* The Samaritan project was dependent on approximately $594,000 in government grants that would expire within a ****444** year if the development was not constructed. "Therefore, the remaining time, it is argued, is critical, especially if alternative easements must be obtained or a pump station constructed, over WMUA disapproval, under the non-Englishtown alternatives." *Id.* at 443–44, 683 *A.*2d 611.

The court emphasized the regional focus on meeting the low and moderate income housing need expressed in *Mount Laurel I* and *Mount Laurel II,* and stated:

> "[I]t is a virtual truism of the modern land-use canon that zoning ordinances must be regionally oriented in their provisions, prohibitions and concerns.... The insularity and parochialism of the Chinese wall theory of municipal zoning has long since been discredited."
>
> [*Id.* at 453 (quoting *Urban Farms, Inc. v. Franklin Lakes,* 179 *N.J.Super.* 203, 213, 431 *A.*2d 163 (App.Div.1981)).]

It recognized that in *Dynasty Building Corp., supra,* 267 *N.J.Super.* 611, 632 *A.*2d 544, there was a pre-existing inter-municipal ***320** agreement for sewer service not present in the instant matter. Nevertheless, the court concluded:

> The time has come to recognize, however, that even in the absence of a pre-existing co-operation or inter-municipal agreement, each municipality, whether developing or developed, has an obligation to facilitate, if not assist, the regional goal of providing realistic housing opportunities for low and moderate income people in a cost effective manner. Everyone is a part of the region's housing solution for its most needy. That is clear in the history of the earlier cited legislative enactments, culminating in the MLUL, as confirmed by the Supreme Court in *Mount Laurel II.* That regional obligation is apparent, even if the municipality does not formally adopt zoning policies to impede such housing development in the neighboring municipality.
>
> This opinion does not attempt to establish the outer limits of that responsibility. That is not necessary for this matter. Suffice to say, however, that as a minimum, in this case, Englishtown has shown no credible reason for outright

denying plaintiffs access to water and sewer service by connection to proximate and cost effective Englishtown lines in order to practically enhance a most important public policy concern. There is no obvious practical detriment, disadvantage or burden to Englishtown weighed against its obligation to facilitate and assist the housing need of the most needy in the region of which it is a necessary part.

[*Id.* at 455, 683 *A.*2d at 620.]

B

In 1975, this Court held that developing municipalities in New Jersey are constitutionally required to provide a realistic opportunity for the development of low and moderate income housing. *Mount Laurel I, supra,* 67 *N.J.* at 174, 336 *A.*2d 713. That mandate was clarified and reaffirmed in *Mount Laurel II, supra,* 92 *N.J.* 158, 456 *A.*2d 390 (1983). In *Mount Laurel II,* we also imposed an affirmative obligation on every municipality to remove unnecessary cost-producing requirements and restrictions that are "barriers to the construction of their fair share of lower income housing," specifically "zoning and subdivision restrictions and exactions that are not necessary to protect health and safety." *Id.* at 259, 456 *A.*2d 390.

We also suggested several "inclusionary zoning techniques" that municipalities could use to meet their fair share of affordable housing, including mandatory set asides and density bonuses, and encouraged ****445** municipalities and our courts to create other methods ***321** for meeting fair share obligations. *Id.* at 265–66, 456 *A.*2d 390. "The core of [the decisions in *Mount Laurel I* and *Mount Laurel II*] is that *every* municipality, not just developing municipalities, must provide a *realistic,* not just a theoretical, opportunity for the construction of lower-income housing." *Holmdel, supra,* 121 *N.J.* at 562, 583 *A.*2d 277 (emphasis in original).

In 1985, the Legislature enacted the Fair Housing Act, *N.J.S.A.* 52:27D–301 to –329(FHA), codifying the *Mount Laurel* doctrine. In *Hills Development Company v. Township of Bernards,* 103 *N.J.* 1, 25, 510 *A.*2d 621 (1986), we upheld the constitutionality of the FHA. The FHA created COAH, the administrative agency to which the Legislature delegated the authority to define regional need for low and moderate income housing, to promulgate regulations establishing criteria and guidelines to enable municipalities to meet their fair share obligation, and the ability to decide whether a municipality's ordinances and related efforts satisfy its *Mount Laurel* obligation. We recognized that COAH's power is "extremely broad," and that "implicit throughout the entire Act, whose purpose is in part to create an agency capable of overseeing the continuing resolution of a monumental social task—is the power, in the Council, to promulgate whatever rules and regulations may be necessary to achieve its statutory task." *Id.* at 32, 61, 510 *A.*2d 621 (citation omitted).

In attempting to comply with their *Mount Laurel* obligation, several municipalities adopted ordinances imposing developer fees as a condition for development approval. Those fees were "dedicated to an affordable-housing trust fund to be used in satisfying the municipality's *Mt. Laurel* obligation." *Holmdel, supra,* 121 *N.J.* at 556, 583 *A.*2d 277. The municipal ordinances varied in how the fees were to be imposed. Some of the ordinances imposed a mandatory fee on all new non-inclusionary developments, including commercial developments, as a condition for development approval. Two of the ordinances provided that "[n]on-inclusionary residential developers may choose between constructing the affordable housing or paying an in-lieu fee." ***322** *Id.* at 561–62, 583 *A.*2d 277. In *Fair Share Housing Center, Inc. v. Township of Cherry Hill,* 173 *N.J.* 393, 802 *A.*2d 512 (2002) also decided today, we discussed at length the rationale for our disposition in *Holmdel.*

At issue in *Holmdel* was whether development fees were a permissible device or method that municipalities could use in meeting their fair share obligation. *Id.* at 573, 583 *A.*2d 277. We held that they were permissible. The Court noted that although the FHA did not expressly authorize municipalities to impose developer fees, the statute does provide "a broad range of general powers" to municipalities to implement any technique to provide its fair share of low income housing. *Ibid.* Therefore, "[s]uch measures do not offend the zoning laws or the police powers." *Ibid.* We also stated that it "is fair and reasonable to impose such fee requirements on private developers when they possess, enjoy, and consume land, which constitutes the primary resource for housing." *Ibid.* (citing *Mt. Laurel II, supra,* 92 *N.J.* at 274, 456 *A.*2d 390).

In that context we found that developer fees were among the types of devices or methods that we encouraged municipalities to consider in *Mount Laurel II,* in addition to mandatory set asides and density bonuses, to meet their fair share obligations. *Id.* at 563, 583 A.2d 277 (citing

*Mount Laurel II, supra,* 92 *N.J.* at 265–66, 456 *A.*2d 390). Accordingly, we requested that "COAH, through its rulemaking procedures, ****446** [ ] specify standards for development fees, so that municipalities may consider using such fees in designing their housing element and fair share plans." *Id.* at 579, 583 *A.*2d 277. In response, COAH promulgated regulations regarding residential development fees, *N.J.A.C.* 5:93–8.10, and non-residential development fees, *N.J.A.C.* 5:93–8.11. *N.J.A.C.* 5:93–8.11 authorizes municipalities to impose such fees on commercial developers. *N.J.A.C.* 5:93–8.10(a) and (b) permit the imposition of such fees on non-inclusionary residential developers.

Pertinent to our discussion is *N.J.A.C.* 5:93–8.10(c), which authorizes the imposition of development fees on owners of sites zoned for inclusionary development and provides that

> ***323** *[m]unicipalities may allow developers of sites zoned for inclusionary development to pay a fee in lieu of building low and moderate income units,* provided the Council determines the municipal housing element and fair share plan provides a realistic opportunity for addressing the municipal fair share obligation. The fee may equal the cost of subsidizing the low and moderate income units that are replaced by the development fee. For example, an inclusionary development may include a 20 percent set-aside, no set-aside and a fee that is the equivalent of a 20 percent set aside or a combination of a fee and set-aside that is the equivalent of a 20 percent set-aside.
>
> [Emphasis added.]

In addition, *N.J.A.C.* 5:93–8.16 addresses certain limitations and guidelines with regard to how development fees are to be expended, and *N.J.A.C.* 5:93–5.1(c) requires municipalities to prepare development fee spending plans specifying, among other things, "a description of the anticipated use of [such fees]," and a "schedule for the creation or rehabilitation of housing units." Furthermore, *N.J.A.C.* 5:93–8.2 provides that "[n]o municipality shall spend development fees unless the Council has approved a plan for spending such fees," and *N.J.A.C.* 5:93–8.19 imposes penalties on municipalities that fail to submit spending plans for approval or fail to implement the plan to spend development fees within time limits and deadlines set by COAH. Although COAH approved Clinton's mandatory developer fee Ordinance in March of 1993, Clinton did not create a spending plan until it applied for its second round petition for substantive certification on December 15, 2000. COAH approved that spending plan in February 2001.

Relying on *Holmdel,* Bi–County argues that its development qualifies as an inclusionary development entitled to all of the benefits afforded inclusionary developers, citing to COAH's interpretation of the FHA as well as COAH's own regulations concerning developers fees. The FHA defines an " 'inclusionary development' as a residential housing development in which a substantial percentage of the housing units are provided for a reasonable income range of low and moderate income households." *N.J.S.A.* 52:27D–304(f). COAH's regulations define an "inclusionary development" as

> a development containing low and moderate income units. This term includes, but is not necessarily limited to, new construction, the conversion of a non-residential ***324** structure to a residential structure and the creation of new low and moderate income units through the gut rehabilitation of a vacant residential structure.
>
> [*N.J.A.C.* 5:93–1.3.]

COAH's cost-generating regulations provide that pursuant to the FHA, the elimination of "unnecessary cost generating features from municipal land use ordinances" for "*inclusionary development* ****447** *applications* " is a requirement of substantive certification:

> In order to receive and retain substantive certification, *municipalities shall eliminate development standards that are not essential to protect the public welfare and to expedite (or "fast track") municipal approvals/denials on inclusionary development applications.*
>
> ... the focus shall be whether the design of the inclusionary development is consistent with the zoning ordinance and the mandate of the Fair Housing Act regarding unnecessary cost generating features. Municipalities shall be expected to cooperate with developers of inclusionary developments in granting reasonable variances necessary to construct the inclusionary development.
>
> [*N.J.A.C.* 5:93–10.1 (emphasis added).]

*N.J.A.C.* 5:93–10.2 identifies what COAH regards as potential cost-generating features of the zoning ordinance of a municipality seeking COAH certification, and provides that [i]n its review of municipal ordinances, the Council shall give special attention to:

> 1. The combined impact of requirements that cumulatively prevent an inclusionary development from achieving the

density and set-aside necessary to address the municipal fair share. Examples of such requirements include but are not limited to: building set-backs, spacing between buildings, impervious surface requirements and open space requirements;

2. Requirements to provide oversize water and sewer mains to accommodate future development without a reasonable prospect for reimbursement;

3. Excessive road width, pavement specifications and parking requirements;

4. Excessive requirements for sidewalks and paved paths;

5. Excessive culvert and pumping station requirements; and

6. Excessive landscape, buffering and reforestation requirements.

In the "Comment and Response" period following the publication of the proposed amendments to *N.J.A.C.* 5:93–10, COAH suggested that the benefits of that rule also were available to developers who paid in-lieu fees.

COMMENT 279: The relief available under subchapter 10 should be available to all developers who participate in a housing plan, not just inclusionary developers with low and moderate income units on their properties. There is no reason for ***325** excluding developers who have agreed to pay a contribution rather than actually constructing low and moderate income housing units.

RESPONSE: Developers that are paying a fee that is the equivalent of a low or moderate income unit are entitled to the relief discussed in subchapter 10.

[25 *N.J.R.* 5782, Comment 279, Dec. 20, 1993.]

Thus, although COAH's own regulatory definition of inclusionary development does *not* include developers who pay a fee in lieu of constructing affordable housing, COAH asserts that such developers nevertheless are entitled to the benefits of the protections against unnecessary cost generating features contained in COAH's regulations. We recognize the principle of judicial deference accorded COAH as an administrative agency, and its broad powers in implementing the Mount Laurel doctrine and the goals of the FHA. See *In re Warren Township,* 132 *N.J.* 1, 26–27, 622 *A.*2d 1257 (1993). We also recognize that we have had occasion to invalidate COAH's exercise of its regulatory power under the FHA. *Id.* at 31, 622 *A.*2d 1257. However, COAH concedes that it lacks ****448** jurisdiction to decide whether an inclusionary developer in one municipality can compel another municipality to allow access to its sewer infrastructure and capacity. COAH's cost generation regulations, as COAH recognizes in its brief, "do not expressly deal with the claimed cost-generating practices of contiguous municipalities or sewer authorities outside the Council's jurisdiction. To the contrary, only the cost-generating features of municipal ordinances of the municipality that has a fair share plan under review by the Council are the focus of these rules which are drafted under the authority of *N.J.S.A.* 52:27D–314(b)."

COAH regulations on their face apply to the cost generating restrictions only of the municipality seeking substantive certification. The benefit of cost avoidance relates to ordinances within the municipality where the inclusionary site is located. COAH asserts that "inclusionary developments," including developments for which the developer pays a fee in lieu of constructing affordable housing, are entitled to relief from such restrictions. But COAH acknowledges that it lacks statutory authorization to grant ***326** relief from cost generating restrictions imposed by a neighboring municipality.

Accordingly, we need not resolve in this appeal whether the Bi–County development is an inclusionary development for purposes of benefiting from COAH's cost generating regulations. We acknowledge that COAH already has made that determination. But because COAH's restrictions on cost generating local ordinances expressly apply, for Bi–County's purposes, only to Clinton Township and, as COAH concedes, are of no force and effect with regard to High Bridge, those restrictions do not assist us in resolving the issue at the root of this appeal.

III

**[3]** In *Dynasty Building Corp.* the Appellate Division relied on the notion of regional responsibility set forth in the *Mount Laurel* decisions to make an exception to the general rule and require that a town's sewer system accommodate an inclusionary development in a neighboring town. In *Dynasty,* however, an inter-municipal agreement already existed requiring that Ramsey's sewer system serve portions of Upper Saddle River. Moreover, the inclusionary development actually included low and moderate income housing.

*Samaritan's* expansion of that doctrine required a municipality, even in the absence of an inter-municipal agreement, to permit an inclusionary development located in a neighboring town to gain access to its sewer system. A non-profit organization, Samaritan's development of low and moderate income houses was vital in fulfilling the public policy mandate to increase the supply of affordable housing. Sewer access was essential for Samaritan's project to go forward. Those circumstances in part explain the court's grant of an exception to the general rule that residents in one municipality have no right to compel a connection to a neighboring municipality's sewer system.

We find the rationale underlying *Samaritan* to be consistent with our holdings in *Mount Laurel I* and *Mount Laurel II.* ***327** However, we decline to extend that rationale to Bi–County. In contrast to *Samaritan,* Bi–County is not building low and moderate income housing. In addition, the success of Bi–County's proposed development is not at stake. Bi–County has alternative means of acquiring sewer service that require it to extend a sewer line along Route 31. Although more expensive than connecting into High Bridge's system, that alternative was Bi–County's plan when the development was granted ****449** initial subdivision approval. In fact, Bi–County instituted suit to gain the sewer capacity that was essential to execution of that alternative sewer plan. After years of negotiation and mediation, Bi–County had a change of heart and elected to try to avoid the cost of constructing the extension by connecting to High Bridge's system. As the Appellate Division recognized, "compelling High Bridge to allow Bi–County to connect into High Bridge's sewer system would not facilitate the construction of lower income housing. It would only lower the costs and thereby increase the potential profits from a development of single family homes and a commercial building." *Bi–County, supra,* 341 *N.J.Super.* at 237, 775 *A.*2d 182.

We acknowledge that development fees may provide significant assistance to municipalities in satisfying their fair share obligation, helping to finance regional contribution agreements and rehabilitation programs. Payment of such fees into a municipality's fair share fund potentially may contribute in the future to the actual construction of low income housing within the municipality. However, in our view the payment of a development fee, either by commercial developers, non-inclusionary residential developers, or by the owners of inclusionary residential sites in the form of in lieu payments, does not have a sufficient nexus to the actual production of low income housing to justify infringing on another municipality's right to restrict access to its sewer system. The connection between payment of a development fee and construction of affordable housing may be substantial in some cases, or remote and insignificant in others, depending on COAH's implementation of its regulations and on a specific municipality's use of development fees. As noted, Clinton Township did not create a ***328** spending plan until February 2001, eight years after COAH approved its mandatory developer fee ordinance and almost seven years after the Bi–County development was granted preliminary subdivision approval. Notwithstanding the potential value of development fees, we decline to elevate Bi–County's status to equal that of Samaritan, a non-profit builder of low income housing whose entire project could have failed without access to water and sewer capacity from a neighboring municipality.

[4] Compelling circumstances should exist in order to justify, under Mount Laurel principles, disturbing the general rule that a municipality may exclude another municipality or its residents from using or connecting to its sewer system. We anticipate that general rule will be disturbed only in the case of developments that substantially and directly serve important regional and environmental interests. The Bi–County development is not in that category.

We imply no view on the soundness of the underlying legislative scheme that authorizes municipalities to finance and construct their own sewer systems for the exclusive use of property owners in the respective municipality. The question whether in special circumstances municipalities should be encouraged, or even required, to make available sewer capacity to property owners in adjacent communities, assuming adequate compensation is paid to the sewered municipality, is for the Legislature. We infer that on occasion such arrangements are negotiated voluntarily.

IV

As modified, we affirm the judgment of the Appellate Division.

VERNIERO, J., dissenting.

The Court holds that Bi–County, a developer that has agreed to pay up to $374,000 toward the construction of low- ****450** and moderate-income housing units, cannot connect to High Bridge's sewer line. In so doing, it forces Bi–County to

spend in excess of $600,000 on ***329** an alternative sewer connection without any determination concerning whether the connection to High Bridge's sewer system would place a burden on that system or on the municipality's taxpayers. More significant than requiring the needless expenditure of funds by this one developer, the Court's holding limits a municipality's flexibility in addressing its *Mount Laurel* obligations. I respectfully dissent.

The critical element of our *Mount Laurel* jurisprudence is that municipalities must undertake an affirmative act to make it "*realistically* possible for lower income housing to be built." *S. Burlington County N.A.A.C.P. v. Township of Mount Laurel*, 92 *N.J.* 158, 261, 456 *A.*2d 390 (1983) (*Mount Laurel II*). This Court consistently has encouraged creativity in the ways in which municipalities can meet their affordable housing obligations. Eschewing rigid mandates, we have stated:

> There are several inclusionary zoning techniques that municipalities must use if they cannot otherwise assure the construction of their fair share of lower income housing. Although we will discuss some of them here, we in no way intend our list to be exhaustive; *municipalities and trial courts are encouraged to create other devices and methods for meeting fair share obligations.*
>
> [*Id.* at 265–66, 456 *A.*2d 390 (emphasis added) (footnote omitted).]

One permissible method is the "in-lieu development fee" that is "expressly dedicated to lower-income housing." *Holmdel Builders Ass'n v. Township of Holmdel*, 121 *N.J.* 550, 569, 573, 583 *A.*2d 277 (1990). In *Holmdel*, we stated that because such fees "are conducive to the creation of a realistic opportunity for the development of affordable housing[,]" they generally would satisfy a municipality's fair share obligation. *Id.* at 573, 583 *A.*2d 277. The Court also noted that "development fees are the functional equivalent of mandatory set-asides[.]" *Ibid.* (Mandatory set-asides require a developer to sell or rent a certain percentage of housing units at below their full value so that the units are affordable to lower-income households. *Mount Laurel II, supra*, 92 *N.J.* at 269, 456 *A.*2d 390.)

Additionally, if a development is deemed to be "inclusionary," then that development is accorded certain protections established ***330** by regulations promulgated under the Fair Housing Act, *N.J.S.A.* 52:27D–301 to –329(FHA). Most relevant here is the protection from "cost-generating" practices of municipalities that serve to preclude the creation of affordable housing. *See N.J.A.C.* 5:93–10.1(a); –10.1(b); –10.2(a). Along those lines, the court in *Samaritan Center, Inc. v. Borough of Englishtown* held that the inclusionary developer in that case was entitled to connect to a neighboring municipality's sewer system. 294 *N.J.Super.* 437, 461, 683 *A.*2d 611 (Law Div.1996). The court grounded its holding in the belief that providing affordable housing in a cost-effective manner is a "regional" responsibility. *Id.* at 455, 683 *A.*2d 611. The court concluded that a neighboring municipality should allow access to its sewer system when "[t]here is no obvious practical detriment, disadvantage or burden to [the neighboring municipality] weighed against its obligation to facilitate and assist the housing need of the most needy in the region of which it is a necessary part." *Ibid.* (footnote omitted).

I am persuaded that the principles articulated in *Samaritan* ought to apply to the Bi–County development. In its brief submitted at our invitation, the Council on Affordable Housing (COAH or Council) makes clear that Bi–County is the equivalent ****451** of an inclusionary developer. COAH concludes: "Bi–County's obligated payments *in lieu* of construction of affordable housing entitles it to the same special status as would otherwise be afforded to any other 'inclusionary development.' " (The in lieu development fee described by COAH under *N.J.A.C.* 5:93–8.10(c) and entitling developers to certain protections is not to be confused with "residential development fees" set forth under *N.J.A.C.* 5:93–8.10(a).) Consistent with COAH's conclusion, the development fee that Bi–County agreed to pay to Clinton is dedicated specifically to lower-income housing. The agreement between the parties states explicitly that Bi–County's "[c]ontribution in lieu of an on-site set aside, ... shall be used by the Township solely for the creation of a realistic housing opportunity for low and moderate income households[.]"

***331** Further, COAH's brief expresses that agency's strong embrace of in-lieu development fees:

> The COAH policy equating sites that produce in-lieu development fees with inclusionary sites that produce housing on site is important because it provides the flexibility needed by municipalities, the Council and the courts to settle *Mount Laurel* disputes.... The in-lieu fees provide

> a necessary source of funding for municipalities to pursue other less intrusive methods of achieving *Mount Laurel* obligations. Under the FHA, municipalities are not obligated to expend their own revenues for purposes of achieving *Mount Laurel* compliance. *N.J.S.A.* 52:27D–311(d). Therefore, money to finance approved affordable housing techniques, such as Regional Contribution Agreements (*N.J.S.A.* 52:27D–312; *N.J.A.C.* 5:93–6.1 *et seq.*), rehabilitation programs (*N.J.A.C.* 5:93–5.2), accessory apartments (*N.J.A.C.* 5:93–5.9) or write down/buy down units (*N.J.A.C.* 5:93–5.1), must come through development fees. Because the payment of an in-lieu development fee is generally greater than the payment of a standard maximum development fee and because the payment of an in-lieu development fee is generally equivalent to the internal subsidization required to provide a unit of affordable housing within an inclusionary development, the Council believes that developers that pay in-lieu fees should receive the same status as inclusionary developers in the COAH process. Accordingly, the Council has historically treated sites that pay in-lieu fees as the equivalent of inclusionary sites where units are built on-site.

We should defer to COAH's policy pronouncements. *Holmdel, supra,* 121 *N.J.* at 577, 583 *A.*2d 277 (observing that "breadth of the legislative mandate and the statutory standards creating COAH's regulatory authority comport with the complexity and sensitivity of the subject of affordable housing"). In evaluating that policy here, I recognize that COAH's existing regulations do not specifically address the issue at hand. Nonetheless, COAH's wide acceptance of in-lieu development fees furnishes the basis on which to apply *Samaritan* to the present dispute. High Bridge is necessarily a part of Hunterdon County that includes Clinton. Based on *Samaritan's* rationale, High Bridge has a regional obligation to assist in a neighboring inclusionary development so long as such assistance presents no detriment or burden to High Bridge or to its taxpayers. Within that framework, I would consider High Bridge's refusal to allow the Bi–County connection to be a "cost-generative" practice that has no practical utility, unless a further-developed record proves otherwise.

The majority reaches a contrary conclusion by distinguishing *Samaritan's* facts ****452** from the facts here. Specifically, the majority ***332** observes that Bi–County is not a "non-profit builder of low income housing whose entire project could have failed without access to water and sewer capacity from a neighboring municipality." *Ante* at 449, 805 *A.*2d at 433. Rather, Bi–County is a for-profit developer that will pay a fee in lieu of setting aside affordable units, and is not encumbered by the time constraints that were present in *Samaritan. Id.* at 444, 805 *A.*2d at 433.

Those distinctions, in my view, serve only to create a hierarchy of inclusionary developers and to further complicate an already complicated field of law. Moreover, the notion of segregating developers that otherwise have acquired inclusionary status runs contrary to *Mount Laurel II, supra,* in which, I repeat, the Court encouraged towns to be creative in designing "devices and methods for meeting fair share obligations." 92 *N.J.* at 266, 456 *A.*2d 390. The Court should not care whether Bi–County itself builds the affordable housing units or whether it finances their construction, so long as the units are built in furtherance of *Mount Laurel's* objectives. *Holmdel, supra,* 121 *N.J.* at 573, 583 *A.*2d 277. Nor should the Court construe the general rule of municipal autonomy announced in *Mongiello v. Borough of Hightstown,* 17 *N.J.* 611, 614–19, 112 *A.*2d 241 (1955), to limit the options of developers and towns that attempt in good faith to comply with the *Mount Laurel* mandate.

In a sound, straightforward decision, the trial court concluded that Bi–County's inclusionary status entitled it to the same protections as other inclusionary developers. That court also determined that forcing Bi–County to spend fifty times more than what it otherwise would have spent on sewer connections is unnecessary. I agree. Accordingly, I would permit Bi–County to connect to the High Bridge system so long as that connection does not burden that system or otherwise affect High Bridge's current or future needs. I would remand for a full hearing to explore those issues. Such a disposition, in my view, is more in keeping with this Court's prior jurisprudence

and the policy that underlies the in-lieu development fee as articulated by COAH.

The judgment of the Appellate Division should be reversed.

***333** Justice LONG joins in this opinion.

*For affirmance*—Chief Justice PORITZ, and Justices STEIN, COLEMAN, LaVECCHIA, and ZAZZALI—5.

*For reversal*—Justices LONG and VERNIERO—2.

**All Citations**

174 N.J. 301, 805 A.2d 433

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239 Ark. 93
Supreme Court of Arkansas.

CABOT INDUSTRIAL DEVELOPMENT CORP. et al., Appellants,
v.
SHEARMAN CONCRETE PIPE COMPANY, Appellee.

No. 5–3444.
|
March 1, 1965.

**Synopsis**

Action by unpaid supplier of sewer pipe against city and two corporations on theory that the pipe had been purchased and used by buyer for use and benefit of city and corporations. The Chancery Court, Lenoke County, Murray O. Reed, Chancellor, entered judgment against defendants and imposed lien in favor of supplier on property occupied by one of the corporations, and appeal was taken. The Supreme Court, Robinson, J., held that city was not liable to supplier where buyer was independent contractor.

Reversed and dismissed.

West Headnotes (3)

[1] **Municipal Corporations** Rights and remedies of third persons

**Public Contracts** Subcontractors, Laborers, and Materialmen; Liens

City was not liable to sewer pipe supplier which had not been paid by independent contractor who had agreed to furnish material and labor and lay extension to sewer line in city for stipulated price.

[2] **Municipal Corporations** Right to lien

**Public Contracts** Miscellaneous persons and claims protected

Ownership of property was immaterial for materialman's lien purposes where sewer line in which independent contractor used pipe furnished by unpaid supplier had not been put in as appurtenance to the property but was simply an extension of the city's sewer system, although the extension had been laid to point that would make it accessible to the property. Ark.Stats. § 51–601.

1 Case that cites this headnote

[3] **Municipal Corporations** Right or Obligation to Connect; Fees

Sewer line constitutes public service available to all property owners who wish to connect therewith.

1 Case that cites this headnote

**Attorneys and Law Firms**

***94** ****337** Smith, Williams, Friday & Bowen, by Herschel H. Friday, and John C. Echols, Little Rock, for appellant.

Griffin Smith, Little Rock, for appellee.

**Opinion**

ROBINSON, Justice.

Appellee, Shearman Concrete Pipe Company, sold and delivered to Harold W. Smith, 2,883 feet of sewer pipe valued at $2,400.35. Smith used the pipe to lay a sewer line in the City of Cabot, but he failed to pay for the pipe. Shearman filed suit against the City of Cabot, Cabot Industrial Development Corporation, and Aire-Line Mobile Homes Corporation, alleging that the pipe was bought and used by Smith for their use and benefit. Shearman also asked for a lien on property owned by the City of Cabot or the Cabot Industrial Development Corporation and leased by Aire-Line Mobile Homes. The Chancellor held in favor of Shearman, rendered a judgment against appellants, and imposed a lien in favor of appellee on the property occupied by Aire-Line.

[1] It is clear from the record that Smith entered into a contract with the City of Cabot whereby the parties agreed that Smith would furnish the material and labor and lay an extension to the sewer line in the City for a stipulated price of $6,842.00. It is also clear that Smith was an independent contractor in connection with putting in the sewer line. Since Smith was an independent contractor, there is no liability on the part of the City to Shearman for the pipe purchased by

Smith. Marion Machine, Foundry & Supply Co. v. Colcord, 174 Ark. 90, 294 S.W. 361.

But Shearman contends that the pipe was used to improve certain property owned by the City or Cabot Industrial Development Corporation and leased to Aire-Line Mobile Homes; that the property in question is, therefore, subject to a materialmen's lien under the provisions of Ark.Stat.Ann. § 51–601 (1947).

[2] [3] There appears to be some controversy about who owned the property in question at the time the sewer line was constructed. None of the line was laid on the *95 property. It makes no difference as to who owned the property because the preponderance of the evidence shows that the sewer line was not put in as an appurtenance to the property in question. It was simply an extension of the sewer system in the City of Cabot. True, the line was laid to a point that would make it accessible to the property in question, but it was not constructed as an appurtenance to that property. The sewer line constitutes a public service, available to all property owners who wish to connect therewith.

Appellee relies largely on Speer Hardware Co. v. Bruce Bros., 105 Ark. 146, 150 S.W. 403, 42 L.R.A.,N.S., 354, but the **338 Speer case is distinguishable from the case at bar. In that case, the pipe was appurtenant to the property involved. Here, the sewer line is not appurtenant to the property on which Shearman seeks a lien. The owner of the property has no control over the sewer line and has no more right to use it than other property owners whose property is so located that a connection can be made with it. In fact, at the time of trial of this case, five other property owners had connected their property with the sewer line.

Reversed and dismissed.

**All Citations**

239 Ark. 93, 387 S.W.2d 336

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2005 WL 3370834

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Connecticut,
Judicial District of Danbury.

CAMBODIAN BUDDHIST SOCIETY OF CT., INC.
v.
NEWTOWN PLANNING AND ZONING COMMISSION.

No. CV030350572S.
|
Nov. 18, 2005.

**Attorneys and Law Firms**

Murtha Cullina LLP, Hartford, for Cambodian Buddhist Society of Connecticut Inc.

Robert Fuller, Wilton, Collins Hannafin Garamella Jaber, Danbury, for Newtown Planning and Zoning Commission.

FRANKEL, J.

*STATEMENT OF APPEAL*

***1** The plaintiff is the Cambodian Buddhist Society of Connecticut, Inc. ("society"). The society is the owner of a parcel of land located at 145 Boggs Hill Road in Newtown, Connecticut ("property"). The property is located in an area designated as a farming and residential R-2 zone. On or about August 8, 2002, the society, through its agent, filed an application with the Newtown planning and zoning commission ("commission") for a special exception to construct a place of religious worship on the property. On February 26, 2003, the commission denied the society's application. The society has appealed said denial pursuant to statute.

The society has claimed in its appeal that the decision of the commission: (1) was arbitrary, illegal and an abuse of its discretion; (2) violated General Statutes Conn. § 52-571b, the Religious Freedom Act ("RFA"); and (3) violated 42 U.S.C. § 2000cc et seq., the Religious Land Use and Institutionalized Persons Act ("RLUIPA").

Joined as defendants pursuant to a motion to intervene (motion # 103 granted on June 2, 2003, by the court, Downey, J.) are abutting property owners and property owners within 100 feet of the property.

*FACTS*

In 1999 the Society purchased the property Newtown. Its president, Pong Me testified that it did so because the property has all of the qualities needed for a temple. Presently there is no temple available to the society to practice its religion. The society has been renting hall space in various locations to conduct its services.

*AGGRIEVEMENT*

The court, Downey J., previously ruled that the society is aggrieved for purposes of General Statutes § 8-8. Therefore, the issues of aggrievement are not addressed here.

*SCOPE OF REVIEW*

"The terms 'special permit' and 'special exception' have the same legal import and can be used interchangeably." *A.P. & W. Holding Corp. v. Planning & Zoning Board,* 167 Conn. 182, 185, 355 A.2d 91 (1974). "A special [exception] allows a property owner to use his property in a manner expressly permitted by the local zoning regulations ... The proposed use, however, must satisfy standards set forth in the zoning regulations themselves as well as the conditions necessary to protect the public health, safety, convenience, and property values." (Internal quotation marks omitted.) *Raczkowski v. Zoning Commission,* 53 Conn.App. 636, 639, 733 A.2d 862, *cert. denied,* 250 Conn. 921, 738 A.2d 658 (1999). See also *Housatonic Terminal Corp. v. Planning & Zoning Board,* 168 Conn. 304, 307, 362 A.2d 1375 (1975).

"When ruling upon an application for a special permit, a planning and zoning board acts in an administrative capacity." (Internal quotation marks omitted.) *Irwin v. Planning & Zoning Commission,* 244 Conn. 619, 627, 711 A.2d 675 (1998). "Acting in this administrative capacity, the [zoning commission's] function is to determine whether the applicant's proposed use is expressly permitted under the regulations, and whether the standards set forth in the regulations and the statute are satisfied." (Internal

quotation marks omitted.) *Raczkowski v. Zoning Commission, supra,* 53 Conn.App. at 639, 733 A.2d 862. "Moreover, [i]t is well settled that in granting a special permit, an applicant must satisf[y] all conditions imposed by the regulations ... The zoning commission has no discretion to deny the special exception if the regulations and statutes are satisfied." (Internal quotation marks omitted.) *Id.,* at 640, 733 A.2d 862. See also *Housatonic Terminal Corp. v. Planning & Zoning Board, supra,* 168 Conn. at 307, 362 A.2d 1375.

***2** "The settled standard of review of questions of fact determined by a zoning authority is that a court may not substitute its judgment for that of the zoning authority as long as it reflects an honest judgment reasonably exercised ... The court's review is based on the record, which includes the knowledge of the board members gained through personal observation of the site ... or through their personal knowledge of the area involved." (Internal quotation marks omitted.) *Raczkowski v. Zoning Commission, supra,* 53 Conn.App. at 643, 733 A.2d 862. "On appeal, a reviewing court reviews the record of the administrative proceedings to determine whether the commission ... has acted fairly or with proper motives or upon valid reasons." (Internal quotation marks omitted.) *Schwartz v. Planning & Zoning Commission,* 208 Conn. 146, 152, 543 A.2d 1339 (1988). "Review of zoning commission decisions by the Superior Court is limited to a determination of whether the commission acted arbitrarily, illegally or unreasonably." (Internal quotation marks omitted.) *Raczkowski v. Zoning Commission, supra,* 53 Conn.App. at 639, 733 A.2d 862.

"[I]t is not the function of the court to retry the case. Conclusions reached by the commission must be upheld by the trial court if they are reasonably supported by the record. The credibility of the witnesses and the determination of issues of fact are matters solely within the province of the agency. The question is not whether the trial court would have reached the same conclusion but whether the record before the agency supports the decision reached." (Internal quotation marks omitted.) *Protect Hamden/North Haven from Excessive Traffic & Pollution, Inc. v. Planning & Zoning Commission,* 220 Conn. 527, 542-43, 600 A.2d 757 (1991). See also *Middlebury v. Planning & Zoning Commission,* Superior Court, judicial district of Waterbury, Docket No. CV 96 0130420 (April 14, 1997, Pellegrino, J.).

"[W]here a zoning commission has formally stated the reasons for its decision the court should not go behind that official collective statement ... [and] attempt to search out and speculate upon other reasons which might have influenced some or all of the members of the commission to reach the commission's final collective decision." *DeMaria v. Planning & Zoning Commission,* 159 Conn. 534, 541, 271 A.2d 105 (1970). "In situations in which the zoning commission ... [states] the reasons for its action, the question for the court to pass on is simply whether the reasons assigned are reasonably supported by the record and whether they are pertinent to the considerations which the commission is required to apply under the zoning regulations ... The agency's decision must be sustained if an examination of the record discloses evidence that supports any one of the reasons given." (Citations omitted; internal quotation marks omitted.) *Irwin v. Planning & Zoning Commission, supra,* 244 Conn. at 629, 711 A.2d 675. "The burden of proof to demonstrate that the [commission] acted improperly is upon the plaintiffs." (Internal quotation marks omitted.) *Bloom v. Zoning Board of Appeals,* 233 Conn. 198, 206, 658 A.2d 559 (1995).

*EVIDENCE OUTSIDE OF THE RECORD*

***3** Pursuant to General Statutes § 8-8(k), the court, Frankel J., by order dated May 25, 2005, allowed the society to present evidence outside of the record. (Order number 140.) The parties had agreed that the society would be able to present evidence on the issue of equal protection. The order allowed the society to present evidence regarding the RLUIPA and RFA.

*EQUAL PROTECTION*

"The [e]qual [p]rotection [c]lause of the [f]ourteenth [a]mendment to the United States [c]onstitution is essentially a direction that all persons similarly situated should be treated alike. *City of Cleburne v. Cleburne Living Center, Inc.,* 473 U.S. 432, 439, 105 S.Ct. 3249, 3254, 87 L.Ed.2d 313 (1985)[,] citing *Plyler v. Doe,* 457 U.S. 202, 216, 102 S.Ct. 2382, 2394, 72 L.Ed.2d 786 [1982]." (Internal quotation marks omitted.) *Zahra v. Southold,* 48 F.3d 674, 683 (2d Cir.1995). "[A] violation of equal protection by selective [treatment] arise[s] if: (1) the person, compared with others similarly situated, was selectively treated; and (2) ... such selective treatment was based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person." *LaTrieste Restaurant & Cabaret, Inc. v. Village of Port Chester,* 40 F.3d 587, 590 (2d Cir.1994), citing *LeClair*

*v. Saunders,* 627 F.2d 606, 609-10 (2d Cir.1980), *cert. denied,* 450 U.S. 959, 101 S.Ct. 1418, 67 L.Ed.2d 383 (1981).

"[T]he requirement imposed upon [p]laintiffs claiming an equal protection violation [is that they] identify and relate specific instances where persons situated similarly in all relevant aspects were treated differently ... *Dartmouth Review v. Dartmouth College,* 889 F.2d 13, 19 (1st Cir.1995) ... *Rubinovitz v. Rogato,* 60 F.3d 906, 910 (1st Cir.1995)." (Emphasis in original; internal quotation marks omitted.) *Cadlerock Properties Joint Venture, L.P. v. Commissioner of Environmental Protection,* 253 Conn. 661, 672, 757 A.2d 1 (2000), *cert. denied,* 531 U.S. 1148, 121 S.Ct. 1089, 148 L.Ed.2d 963 (2001). See also *Alexander v. Commissioner of Administrative Services,* 86 Conn.App. 677, 684, 862 A.2d 851 (2004).

Viewed in the light most favorable to the plaintiffs, the following evidence was before the court and is relevant to the determination of whether the society had established a prima facie case of an equal protection violation by the defendants.

The society presented three instances of religious institutions being granted special permits in Newtown.

The first is the two applications of Congregation Adath Israel. Prior to 1900 Adath Israel had a synagogue in Newtown. It sought to build a new synagogue a short distance from the old. The first application failed by a vote of three to two due to the size of the building. Its second application was approved because it was determined that the lot was not as small as previously thought, rather than being under two acres it was actually two acres.

***4** The society argued that since Adath Israel did not have to reduce the size of its building, it was treated differently from the society. That argument fails because the Society failed to recognize that it was determined that the lot was larger than first thought. However, Adath Israel's application was approved with the special condition that the height of the building conform to requirements. (See exhibits 2, 7, and 6.)

The next application the society introduced was the application of the Newtown United Methodist Church requesting an addition to the existing building adjacent to the church. This example also fails because the commission found that the improvements to the property were minor and did not change the permitted use. (See exhibits 11, 13, and 18.)

The last application presented by the society was the application of the Newtown Congregational Church. This property is located in the borough of Newtown and acted on by a different agency than the commission.

There are additional distinguishing factors among these examples presented by the society. With the exception of the Adath Israel's property, all are located on or close to state highways, all are connected to public sewers and all properties have traffic report levels of service A.

Based upon the above, the court finds that society has not met its burden of proof in regards to its equal protection claims.

*RLUIPA*

The Religious Land Use and Institutionalized Person Act (RLUIPA) was passed by Congress in 2000 in response to the Supreme Court decision in *City of Boerne v. Flores,* 521 U.S. 57, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997), which invalidated the Religious Freedom and Restoration Act of 1993. See generally *Cutter v. Wilkinson,* 544 U.S. 544 U.S. 709, ---- - ----, 125 S.Ct. 2113, 2117-18, 161 L.Ed.2d 1020, (2005). The current statute provides the following "[g]eneral rule" for "[p]rotection of land use as religious exercise":

> No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person; assembly, or institution-
>
> (A) is in furtherance of a compelling government interest; and
>
> (B) is the least restrictive means of furthering that compelling interest.

42 U.S.C. § 2000cc(a)(1).

*RFA-CONNECTICUT GENERAL STATUTES § 52-571b*

The claim has also been made by the society that the commission violated Connecticut's Religious Freedom Act (RFA), found in General Statutes § 52-571b, which reads as follows:

> Action or defense authorized when state or political subdivision burdens a person's exercise of religion.

(a) The state or any political subdivision of the state shall not burden a person's exercise of religion under section 3 of article first of the Constitution of the state even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.

***5** (b) The state or any political subdivision of the state may burden a person's exercise of religion only if it demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest, and (2) is the least restrictive means of furthering that compelling governmental interest.

(c) A person whose exercise of religion has been burdened in violation of the provisions of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against the state or any political subdivision of the state.

(d) Nothing in this section shall be construed to authorize the state or any political subdivision of the state to burden any religious belief.

(e) Nothing in this section shall be construed to affect, interpret or in any way address that portion of article seventh of the Constitution of the state that prohibits any law giving a preference to any religious society or denomination in the state. The granting of government funding, benefits or exemptions, to the extent permissible under the Constitution of the state, shall not constitute a violation of this section. As used in this subsection, the term "granting" does not include the denial of government funding, benefits or exemptions.

(f) For the purposes of this section, "state or any political subdivision of the state" includes any agency, board, commission, department, officer or employee of the state or any political subdivision of the state, and "demonstrates" means meets the burdens of going forward with the evidence and of persuasion.

General Statutes § 52-571b.

*DISCUSSION*

"RLUIPA, by its terms, applies to any case in which the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved." *House of Fire Christian Church v. Zoning Board of Adjustment of the City of Clifton,* Superior Court of New Jersey, Appellate Division, No. A-2019-03T2 (Passaic County, August 22, 2005).

"[A] government agency implements a 'land use regulation' only when it acts pursuant to a 'zoning or landmarking law' that limits the manner in which a claimant may develop or use property in which the claimant has an interest." *Prater v. City of Burnside,* 289 F.3d 417, 434 (6th Cir.), *cert. denied,* 537 U.S. 1018, 123 S.Ct. 550, 154 L.Ed.2d 425 (2002). See also 42 U.S.C. § 2000cc-5(5) (defining "land use regulation").

"To establish a prima facie case under RLUIPA [the society] must allege facts sufficient to show that [the commission's] conduct in denying the [a]pplication: (1) imposes a substantial burden; (2) on the 'religious exercise;' (3) of a person, institution or assembly." *Westchester Day School v. Village of Mamaroneck,* United States District Court, No. 02 Civ. 6291(WCC) (S.D.N.Y. July 27, 2005). "If a plaintiff produces prima facie evidence to support a claim alleging a violation of the [f]ree [e]xercise [c]lause [of the [f]irst [a]mendment to the United States [c]onstitution] or a violation of [RLUIPA], the government shall bear the burden of persuasion on any element of the claim, except that the plaintiff shall bear the burden of persuasion on whether the law (including a regulation) or government practice challenged by the claim substantially burdens the plaintiff's exercise of religion." *House of Fire Christian Church v. Zoning Board of Adjustment of the City of Clifton, supra,* citing 42 U.S.C. § 2000cc-2(b). Thus, to invoke the protection of § (a) of RLUIPA, the society bears the burden of first demonstrating that the denial of its application substantially burdens its religious exercise." *Sts. Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin,* 396 F.3d 895, 899 (7th Cir.2005); *Midrash Sephardi, Inc. v. Town of Surfside,* 366 F.3d 1214, 1125 (11th Cir.2004), *cert. denied,* 543 U.S. 1146, 125 S.Ct. 1295, 161 L.Ed.2d 106 (2005); *Civil Liberties for Urban Believers v. City of Chicago,* 342 F.3d 752, 760 (7th Cir.2003), *cert. denied,* 541 U.S. 1096, 124 S.Ct. 2816, 159 L.Ed.2d 262 (2004) [hereinafter "CLUB"]. If the plaintiff makes such a showing, then the burden shifts to the local government to demonstrate that the challenged imposition or implementation of the land use regulation "is in furtherance of a compelling governmental interest" and "is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000cc(a)(1)(A)-(B).

***6** While the RLUIPA requires a "substantial burden" on religious exercise, RFA merely requires a "burden" on religious exercise. General Statutes § 52-571b(a). Should the society demonstrate such a burden, the commission's duty to convince the court that its application of the zoning regulations furthers a compelling government interest using the least restrictive means remains the same. General Statutes § 52-571b(b).

"The Second Circuit has noted that despite the relatively liberal definition of 'religious exercise' provided in the Act, the legislative history of RLUIPA suggests that the definition does have limits that must be respected." *Westchester Day School v. Village of Mamaroneck, supra,* United States District Court, No. 02 Civ. 6291(WCC), citing *Westchester Day School v. Village of Mamaroneck,* 386 F.3d 183, 190 n. 4 (2d Cir.2004), quoting 146 Cong. Rec. S7774-01, S7776 (July 27, 2000) (cautioning that " 'not every religious activity carried out by a religious entity or individual constitutes religious exercise' " and noting that activities or facilities that are owned, sponsored or operated by a religious institution do not automatically fall within RLUIPA's definition of "religious exercise").

The term "religious exercise" is, nevertheless, broadly defined by RLUIPA to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A). Under RLUIPA, "[t]he use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose." 42 U.S.C. § 2000cc-5(7)(B). It is clear that the church's proposed plan to build a house of worship on its property and to use the proposed structure for holding church services for members of its congregation constitutes "religious exercise." As explained by the co-sponsors of RLUIPA as part of the need for this legislation: "The right to assemble for worship is at the very core of the free exercise of religion. Churches and synagogues cannot function without a physical space adequate to their needs and consistent with their theological requirements. The right to build, buy, or rent such a space is an indispensable adjunct of the core [f]irst [a]mendment right to assemble for religious purposes." 146 Cong. Rec. S77745 (July 27, 2000) (joint statement of Senators Hatch and Kennedy) [hereinafter "Joint Statement"].

The term "substantial burden" is not defined by RLUIPA; rather, its proponents intended that the term "be interpreted by reference to Supreme Court jurisprudence," and that it "not ... be given any broader interpretation than the Supreme Court's articulation of the concept of substantial burden [on] religious exercise." Joint Statement, S7776.

"[T]he Supreme Court has articulated the substantial burden test differently over the years. See *Lyng v. Northwest Indian Cemetery Protective Ass'n.,* 485 U.S. 439, 450-51 [108 S.Ct. 1319, 99 L.Ed.2d 534] (1988). In *Lyng,* the Supreme Court stated that for a governmental regulation to substantially burden religious activity, it must have a tendency to coerce individuals into acting contrary to their religious beliefs. *Id.;* see also *Thomas v. Review Board of Indiana Employment Security Division,* 450 U.S. 707, 717-18 [101 S.Ct. 1425, 67 L.Ed.2d 624] (1981) (holding that a substantial burden exists where the government puts 'substantial pressure on an adherent to modify his behavior and to violate his beliefs ...'). Thus, for a burden on religion to be substantial, the government regulation must compel action or inaction with respect to a sincerely-held belief; mere inconvenience to the religious institution or adherent is insufficient. See *Werner v. McCotter,* 49 F.3d 1476, 1480 [ (10th Cir.), *cert. denied,* 515 U.S. 1166, 115 S.Ct. 2625, 132 L.Ed.2d 866 (1995) ]; see also *Jolly v. Coughlin,* 76 F.3d 468, 477 (2d Cir.1996). Courts in [the Second] Circuit have concluded that the regulations must have a 'chilling effect' on the exercise of religion to substantially burden religious exercise. See *Murphy v. Zoning Commission of Town of New Milford,* 148 F.Sup.2d 173, 188-89 (D.Conn.2001) [vacated, 402 F.3d 342 (2005) ]. However, that a 'burden would not be insuperable would not make it insubstantial.' *Sts. Constantine and Helen Greek Orthodox Church, Inc. v. City of New Berlin* [*supra,*] 396 F.3d ... at 901 ... (noting that just because the plaintiff could re-submit its application with a different 'planned unit development' did not mean that defendant's denial of its original application was not a substantial burden)." *Westchester Day School v. Village of Mamaroneck, supra,* United States District Court, No. 02 Civ. 6291(WCC).

***7** Interpreting RLUIPA, the Seventh, Ninth and Eleventh Circuits respectively provide "substantial burden" tests that remain the highest existing authority on the statute in the context of a land use decision. The Seventh Circuit originally adopted the following definition of substantial burden: "[I]n the context of RLUIPA's broad definition of religious exercise, a land-use regulation that imposes a substantial burden on religious exercise is one that necessarily bears a

direct, primary, and fundamental responsibility for rendering religious exercise-including the use of real property for the purpose-thereof within the regulated jurisdiction generally-effectively impracticable." *CLUB v. City of Chicago, supra,* 342 F.3d at 761.

The Ninth Circuit provided its version of the substantial burden test in a ruling "entirely consistent" with the Seventh Circuit's *CLUB* decision. *San Jose Christian College v. City of Morgan Hill,* 360 F.3d, 1024, 1035 (9th Cir.2004). "A 'burden' is 'something that is oppressive.' Black's Law Dictionary 190 (7th Ed.1999). 'Substantial,' in turn, is defined as 'considerable in quantity' or 'significantly great.' Merriam-Webster's Collegiate Dictionary 1170 (10th Ed.2002). Thus, for a land use regulation to impose a 'substantial burden,' it must be 'oppressive' to a 'significantly great' extent. That is, a 'substantial burden' on 'religious exercise' must impose a significantly great restriction or onus upon such exercise." *Id.,* at 1034.

The Eleventh Circuit on the other hand declined to adopt the Seventh Circuit's definition in *CLUB* because "it would render § b(3)'s total exclusion prohibition meaningless." *Midrash Sephardi, Inc. v. Town of Surfside, supra,* 366 F.3d at 1127. The "[*CLUB* ] test reads quite a bit more into the word 'substantial' than is warranted by the text, purpose or history of the statute. Indeed, such a reading would inappropriately fuse the 'substantial burden' prong of RLUIPA with the narrower 'exclusion limitation' provision." *Guru Nanak Sikh Society v. County of Sutter,* 326 F.Sup.2d 1140, 1153-54 (E.D.Cal.2003).

Nevertheless, the Eleventh Circuit agrees that a "substantial burden" requires something more than an incidental effect on religious exercise: "[A] 'substantial burden' must place more than an inconvenience on religious exercise; a 'substantial burden' is akin to a significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly. Thus, a substantial burden can result from pressure that tends to force adherents to forego religious precepts or from pressure that mandates religious conduct." *Midrash Sephardi, Inc. v. Town of Surfside, supra,* 366 F.3d at 1127.

After the Eleventh Circuit's *Midrash Shepardi, Inc.* decision the Seventh Circuit revisited its interpretation of the "substantial burden" test. See *Sts. Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin, supra,* 396 F.3d at 895. "A separate provision of the [RLUIPA] forbids government to 'impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution.' " *Id.,* at 900, citing 42 U.S.C. § 2000cc(b)(1) and (2). The "substantial burden" provision under 42 U.S.C. § 2000cc(a)(1) must thus mean something different from "greater burden than imposed on secular institutions." *Sts. Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin, supra,* at 900.

***8** The church in *Sts. Constantine* acquired property in a residential zone. It originally applied for permission to rezone a parcel of the property from residential to institutional in order to build a new church. To allay the planning department's concern that, should the church decide to forgo its plans for the site, a school or another nonreligious facility might be built on the property, however, the church modified its application by coupling with the rezoning a proposal that the city promulgate a planned unit development ordinance limiting the parcel to church-related uses. The city council, nevertheless, voted the proposal down on legal grounds the court found to be mistaken, and proposed alternatives that the court deemed unrealistic. Inasmuch as the court found the church willing to bind itself by any means necessary not to sell the land for a nonreligious institutional use, a factor that would eliminate the city's only legitimate concern, the court concluded that the church was substantially burdened and provided the parties with a stay to give the city an opportunity to negotiate with the church to work out an effective solution before providing the church with its requested relief.

With the following analysis, Judge Posner articulated the court's conclusion that the church suffered a substantial burden: "The [c]hurch could have searched around for other parcels of land (though a lot more effort would have been involved in such a search than, as the [commission] would have it, calling up some real estate agents), or it could have continued filing applications with the [commission], but in either case there would have been delay, uncertainty, and expense. That the burden would not be insuperable would not make it insubstantial." *Sts. Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin, supra,* 396 F.3d at 901.

Applying *Sts. Constantine, CLUB* and *Midrash,* a United States District Court under the jurisdiction of the Sixth Circuit concluded similarly that the denial of a special use permit to construct a building in excess of a specified height imposed a substantial burden on religious exercise

under RLUIPA when the plaintiff would incur delay, expense and uncertainty if it was required to reapply or search for another site. *Living Water Church of God v. Charter Township of Meriden,* United States District Court, File No. 5:04-CV-06 (W.D.Mich. August 23, 2005). The court found the denial of the special use permit directly responsible for rendering the plaintiff's ability to use its real property for its religious purposes effectively impracticable, thus imposing a substantial burden on religious exercise. *Id.*

"At a minimum, a substantial burden is one which actually inhibits religious practice by virtue of a land use decision." *Guru Nanak Sikh Society v. County of Sutter, supra,* 326 F.Sup.2d at 1154. The religious activities need not be "fundamental" to the society's practice of religion. *Grace United Methodist Church v. City of Cheyenne,* United States Court of Appeals, Docket No. 03-8060 (10th Cir. October 25, 2005). "RLUIPA's 'substantial burden' test does not require that [the society] actually establish discrimination ... It is sufficient that the [commission's] actions have had an actually inhibiting effect on [the society's] ability to practice its religion ..." *Guru Nanak Sikh Society v. County of Sutter, supra,* at 1153.

***9** The Second Circuit has yet to reach the merits of a land use case under RLUIPA, but, in the *Westchester Day School* case, the preliminary guidance it provides to lower courts applying the substantial burden test is incongruous with the Seventh Circuit's *Sts. Constantine* decision. Compare *Westchester Day School v. Village of Mamaroneck, supra,* 386 F.3d at 189-90 with *Sts. Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin, supra,* 396 F.3d at 900. "As a legislative accommodation of religion, RLUIPA occupies a treacherous narrow zone between the [f]ree [e]xercise [c]lause, which seeks to assure that government does not interfere with the exercise of religion, and the [e]stablishment [c]lause, which prohibits the government from becoming entwined with religion in a manner that would express preference for one religion over another, or religion over irreligion. As the Supreme Court has noted, " '[a] proper respect for both the [f]ree [e]xercise and the [e]stablishment [c]lauses compels the [s]tate to pursue a course of neutrality toward religion," favoring neither one religion over others nor religious adherents collectively over nonadherents.' " *Westchester Day School v. Village of Mamaroneck, supra,* 386 F.3d at 189, citing *Board of Education of Kiryas Joel Village School District v. Grumet,* 512 U.S. 687, 696, 114 S.Ct. 2481, 129 L.Ed.2d 546 (1994), quoting *Commission for Public Education & Religious Liberty v. Nyquist,* 413 U.S. 756, 792-93, 93 S.Ct. 2955, 37 L.Ed.2d 948 (1973). See also *Locke v. Davey,* 540 U.S. 712, 124 S.Ct. 1307, 1311, 158 L.Ed.2d 1 (2004); *Hobbie v. Unemployment Appeals Commission,* 480 U.S. 136, 144-45, 107 S.Ct. 1046, 94 L.Ed.2d 190 (1987) ("[T]he government may (and sometimes must) accommodate religious practices and ... may do so without violating the [e]stablishment [c]lause."). "While government unquestionably may take positive steps to protect the free exercise of religion, it must avoid going so far in this goal as to adopt a preference for one religion or for religion generally." *Westchester Day School v. Village of Mamaroneck, supra,* 386 F.3d at 190.

Though the Seventh Circuit implies that the statute affords religious institutions greater protection than secular institutions; *Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin, supra,* at 900 ("A separate provision of the Act forbids government to 'impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution.' "); the Second Circuit instructs courts in our jurisdiction to pursue a course of neutrality that does not favor religion over irreligion. *Westchester Day School v. Village of Mamaroneck, supra,* at 189-90. If two identically situated institutions, one being religious and the other secular, submit functionally identical applications to a zoning body, the *Westchester Day School* court expressed doubt that RLUIPA is broad enough to permit the zoning authority to reject the application of the secular institution but permit the application of the religious institution. *Id.* As a general rule, therefore, at least in our jurisdiction, a religious institution is less likely to have suffered a substantial burden when evidence shows that a zoning authority denied an application on grounds it would have applied equally to a secular institution submitting an identical proposal. *Id.*

***10** The Second Circuit, by implication, aligns itself closer with the *Midrash* line of cases, which view a substantial burden as a direct coercion that forces adherents to forgo religious precepts. *Midrash Sephardi, Inc. v. Town of Surfside, supra,* 366 F.3d at 1127. State courts interpreting the "substantial burden" requirement under RLUIPA have also set high thresholds for aggrieved parties attempting to establish a prima facie case. See, e.g., *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. City of West Linn,* 338 Or. 453, 111 P.3d 1123 (2005). "[A] government regulation imposes a substantial burden on religious exercise only if it 'pressures' or 'forces' a choice between following religious precepts and forfeiting certain

benefits, on the one hand, and abandoning one or more of those precepts in order to obtain the benefits, on the other." *Id.*, at 1130, citing *Sherbert v. Verner*, 374 U.S. 398, 404, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963).

Although the Connecticut case law interpreting the RLUIPA is limited, our Appellate Court, in per curiam decision under the RFA, *First Church of Christ v. Historic District Commission*, 55 Conn.App. 59, 737 A.2d 989 (per curiam), *cert. denied*, 251 Conn. 923, 742 A.2d 358 (1999), "adopt[ed] the Superior Court's well reasoned decision in *First Church of Christ v. Historic District Commission*, 46 Conn.Supp. 90 [738 A.2d 224] (1999), which stated that "[c]hurches and religious organizations can be regulated under a state's police power if that regulation is religiously neutral and for secular purposes. *Lemon v. Kurtzman*, 403 U.S. 602, 614, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971). In the ... case, the plaintiff ... [claimed] that its free exercise rights were somehow burdened by the commission's denial of its application to reclad its church with aluminum siding. The commission's decision, however, [did] not [interfere] with the right of the plaintiff or its members to express their religious views, or associate or assemble for that purpose. Further, the restrictions within the historical district [applied] to all other property owners within the district. 'The first amendment cannot be extended to such an extent that a claim of exemption from the laws based on religious freedom can be extended to avoid otherwise reasonable and neutral legal obligations imposed by government.' *Grace Community Church v. Bethel*, Superior Court, judicial district of Danbury, Docket No. CV 306994 [ (July 16, 1992, Fuller, J.) (7 Conn. L. Rptr. 65), *aff'd*, 30 Conn.App. 765, 622 A.2d 591, *cert. denied*, 226 Conn. 903, 625 A.2d 1375 (1993) ], citing *Employment Division v. Smith*, 494 U.S. 872, 888, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990). The plaintiff [had] not shown that the commission's actions ... [constituted] an unreasonable restriction on the free exercise of religion." *First Church of Christ v. Historic District Commission, supra*, 46 Conn.Supp. at 101, 738 A.2d 224.

***11** At least one other Superior Court decision in Connecticut, discussing both the RLUIPA and RFA, also touched on the relationship between the free exercise of religion and the safety and traffic issues a zoning commission must assess when applying zoning regulations. *Farmington Avenue Baptist Church v. Farmington*, Superior Court, judicial district of Hartford, Docket No. CV 01 0811563 (July 9, 2003, Beach, J.) (35 Conn. L. Rptr. 209). "Secular concerns such as safety do not impinge on the exercise of religion, assuming, of course, that the recitation of such concerns is not a mere pretext. Our case law already establishes a heightened scrutiny as to the more general and less quantitative considerations. The statutes seeking to preserve the value of freedom of religion can peacefully coexist with zoning regulations regarding safety, traffic, and the like, so long as those concerns are not used to mask discriminatory intent." *Id.*, at 211 n. 4.

In addition to the case law, the legislative histories of the RLUIPA and the RFA underscore the legislatures' intent not to exempt religious institutions from the procedural hurdles facing all development projects. The RLUIPA "does not provide religious institutions with immunity from land use regulation, nor does it relieve religious institutions from applying for variances, special permits or exceptions, hardship approval, or other relief provisions in land use regulations, where available without discrimination or unfair delay." Joint Statement, S7774-01, S7776. In Connecticut, correspondingly, debate in the General Assembly over Public Act 93-252 indicates that "a group simply by evoking [the RFA] or evoking the [f]irst [a]mendment, would not be able to avoid ... a reasonable municipal requirement that a permit be obtained." 36 H.R. Proc., Pt. 14, 1993 Sess., p. 4937, remarks of Representative Radcliffe. "Assuming that the permit requirements would effectuate the public health, safety and welfare, are equally and evenly applied to all participants, then [the requirement that the group obtain a permit] would be the same." *Id.*, at p. 4937, remarks of Representative Tulisano. "[C]hurches, under this law ... are required to fulfill the building codes that are required of them. Those similar type of things are required of everybody and they ... do fulfill the [s]tate's interest." *Id.*, at p. 4938, remarks of Representative Tulisano.

The commission in the present appeal required the society to submit a complete application, as testimony showed the commission requires of all applicants. *San Jose Christian College v. Morgan Hill, supra*, 360 F.3d at 1035. Where a government body impairs a religious institution's ability to build a place of worship, the relevant burden is the burden of being prevented from implementing the particular proposal at issue, plus, logically, the burden of submitting a new application. See *Corporation of the Presiding Bishop v. City of West Linn, supra*, 111 P.3d at 1126. As *Westchester Day School* states, "rejection of a submitted plan, while leaving open the possibility of approval of a resubmission with modifications designed to address the cited problems, is less likely to constitute a 'substantial burden' than

definitive rejection of the same plan, ruling out the possibility of approval of a modified proposal." *Westchester Day School v. Village of Mamaroneck, supra,* 386 F.3d at 188. See also *Cathedral Church of Intercessor v. Village of Malverne,* United States District Court, CV 02-2989(TCP)(MO)(E.D.N.Y. January 25, 2005). There is no evidence in the record demonstrating that the society is precluded from using other sites within the town, nor is there any evidence that the commission would not impose the same traffic and safety requirements on any other entity seeking to build on the property. *San Jose Christian College v. Morgan Hill, supra,* at 1035. Should the society obtain the relevant approvals from other agencies, submit a new proposal that addresses the commission's concerns and/or provide additional evidence on the traffic and safety issues identified by the commission, it is not apparent that its application will be denied. *Id.*

***12** When a church in Florida purchased property subject to zoning ordinances for the sole purpose of renovating, building and developing it as a permanent home for realizing the mission of the church, a local zoning board denied the church's request for a zoning variance to operate a church on the property on the ground that the variance would not be in harmony with the community and the traffic would be detrimental to the public welfare. *Primera Iglesia Bautista Hispana v. Broward County,* United States District Court, Docket No. 01-6530-CIV-Martinez/Klein (S.D.Fla. September 30, 2004). Applying the RLUIPA, the federal district court found that the church created its own hardship and burden by purchasing the property without a condition of zoning and therefore failed to establish a prima facie case under § (a). *Id.,* at 20.

Instead of a variance, however, the present appeal involves an application for a special permit. The essential difference between a variance and a special permit is that the variance permits the owner to develop and use the property in a manner forbidden by the zoning regulations, while the special permit authorizes those uses that are explicitly permitted in the regulations. T. Tondro, Connecticut Land Use Regulation (2d Ed.1992) p. 177, citing *Burlington v. Jencik,* 168 Conn. 506, 509, 362 A.2d 1338 (1975); *Parish of St. Andrew's Protestant Episcopal Church v. Zoning Board of Appeals,* 155 Conn. 350, 353, 232 A.2d 916 (1967); see also *Mitchell Land Co. v. Planning & Zoning Board of Appeals,* 140 Conn. 527, 532-33, 102 A.2d 316 (1953); 83 Am.Jur.2d 701, 803-04, Zoning and Planning §§ 831, 960 (1992). "The prerequisite for obtaining a variance is a demonstration that enforcement of the regulations for a particular parcel would impose such a hardship that enforcement would be all but an unconstitutional taking of the property. Hardship is irrelevant when a commission considers granting a special permit, however. Instead the condition precedent is that the regulations specify that the particular use is permissible upon the issuance of a special permit, which is available under listed circumstances." T. Tondro, *supra,* at p. 177.

"Although it is true that the zoning commission does not have discretion to deny a special permit when the proposal meets the standards, it [nevertheless possesses the] discretion to determine whether the proposal meets the standards set forth in the regulations. If, during the exercise of its discretion, the zoning commission decides that all of the standards enumerated in the special permit regulations are met, then it can no longer deny the application. The converse is, however, equally true. Thus, the zoning commission can exercise its discretion during the review of the proposed special exception, as it applies the regulations to the specific application before it." *Irwin v. Planning & Zoning Commission, supra,* 244 Conn. at 628, 711 A.2d 675.

The society argues that it "cannot simply build a Buddhist temple anywhere, and that a temple site has to be conducive to creating a peaceful, meditative environment." "The [society], however, do[es] not claim that locating [its] house of worship in a residential area is a basic tenet of [its] faith." *Congregation Kol Ami v. Abington Township,* United States District Court, Civil Action No. 01-1919 (E.D.Pa. August 12, 2004). The first amendment does not guarantee a perfect fit between available land and proposed religious purposes. *Id.,* citing *Love Church v. City of Evanston,* 896 F.2d 1082, 1086 (7th Cir.), *cert. denied,* 498 U.S. 898, 111 S.Ct. 252, 112 L.Ed.2d 210 (1990). The lack of designated meditation space does not in itself impose a substantial burden. *Episcopal Student Foundation v. City of Ann Arbor,* 341 F.Sup.2d 691, 706 (E.D.Mich.2004).

***13** The society also argues that it lacks meeting and gathering space. But in the intervening time period between the current denial and an application that eventually meets the commission's traffic, health and safety concerns, whether at the current site or another location, "events may [continue to] be hosted at members' homes or at other facilities permitted in residential neighborhoods. While this will undoubtedly be more difficult, inconvenient, and expensive than simply [hosting activities at its own facility], it is not the type of burden recognized by the [f]irst [a]mendment." *Congregation Kol Ami v. Abington Township, supra,* United States District

Court, Civil Action No. 01-1919. "[T]he burden imposed on the [society] does not prevent conduct mandated by a central tenet of its religion ... it is only an indirect financial and aesthetic burden." *Id.* "[T]here is no indication that [the society] is precluded from fulfilling its religious mission through worship as a whole, or through its various other activities, in other locations throughout the [town]. See *Lakewood [Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood,* 699 F.2d 303, 307 (6th Cir.), *cert. denied,* 464 U.S. 815, 104 S.Ct. 72, 78 L.Ed.2d 85 (1983) ]. Nothing in the record suggests that the [society] could not [continue to] lease or sublease an existing church or meeting hall to facilitate its worship as a whole, or its other religious endeavors ... [s]ee *Love Church v. City of Evanston,* 671 F.Supp. 508, 513-14 ... [a]lthough [t]hese alternatives may be less appealing or more costly ..." (Internal quotation marks omitted.) *Episcopal Student Foundation v. City of Ann Arbor, supra,* 341 F.Sup.2d at 705.

After reviewing the complete return of record and the evidence outside the record pursuant to § 8-8(k), the court finds that the society failed to meet the initial burden of demonstrating that the commission imposed a "substantial burden" on religious exercise. The court further finds that the society has not met its burden of demonstrating that the commission's denial imposed a "burden" on its religious exercise. Whereas the denial of the special permit did not impose a burden on religious exercise, the court need not reach the question of whether the commission can justify these reasons by articulating a compelling government interest. See *Midrash Sephardi, Inc. v. Town of Surfside, supra,* 366 F.3d at 1228.

The court, however, is not unsympathetic with the society's concern that a commission may use technicalities in the zoning regulations as a pretext to prevent development projects it deems undesirable. Indeed, *Sts. Constantine* demonstrates the lenity of the substantial burden test when it is apparent that an administrative body is "playing a delaying game" that emits a "whiff of bad faith" over the rejection of a submitted application. *Sts. Constantine & Helen Greek Orthodox Church v. City of New Berlin, supra,* 396 F.3d at 899, 901. Even the Second Circuit, with its stringent view of what constitutes a substantial burden under the free exercise clause, acknowledges that a substantial burden may be found where a commission's willingness to consider reapplications is "disingenuous." *Westchester Day School v. Village of Mamaroneck, supra,* 386 F.3d at 188 n. 3. "[I]n some circumstances denial of the precise proposal submitted may be found to be a 'substantial burden' notwithstanding a board's protestations of willingness to consider revisions-for example, where the board's stated willingness is disingenuous, or a cure of the problems noted by the board would impose so great an economic burden as to make amendment unworkable, or where the change demanded would itself constitute a burden on religious exercise." *Id.* The commission would be wise to remain cognizant of these admonishments in its future interactions with the society. In the interest of assisting the parties in the process, the court will briefly articulate its views on each reason the commission denied the society's application.

***14** The commission denied the society's request for a special permit for six reasons. Had a prima facie case been established under RLUIPA or the RFA, it is worth noting that the court would have found that at least four of the cited reasons neither constitute a compelling government interest nor prevail as the least restrictive means of furthering that interest. These denials are as follows:

1. *Section 8.04.710 The proposed use shall be in harmony with the general character of the neighborhood.*

2. *Section 8.04.720 The proposed use shall not be inconsistent with the intent and purpose of these regulations.*

3. *Section 8.04.730 The proposed use shall not substantially impair property values in the neighborhood.*

6. *Section 8.04.770 The architectural design of the proposed buildings shall be in harmony with the design of other buildings on the lot and within 1,000 feet of the perimeter of the lot for which the special exception is sought.*

The commission found that the society did not meet these four requirements of the zoning regulations of the town of Newtown. In the letter of denial the commission stated: "Harmony is in the eye of the beholder-many find the temple appearance is extremely uncharacteristic of the neighborhood and therefore very objectionable" and "the churches with the comparable sales were of a typical New England design versus a traditional Buddhists' temple design." (ROR 4.) Notwithstanding the commission's attempt to apply the town's zoning regulations, each of these four reasons, in effect, would prevent a "nontraditional" non-Judeo/Christian religion from building its temple in the town of Newtown. "[A]pplication of some of the more intrinsically vague standards, such as architectural harmony and integrity of the

neighborhood, are viewed with stricter scrutiny, both because of the more obvious religious overtones of features such as architecture and of the possibility of exclusion for suspect reasons." *Farmington Avenue Baptist Church v. Planning & Zoning Commission, supra,* 35 Conn. L Rptr. at 211, citing *Bethlehem Christian Fellowship, Inc. v. Planning & Zoning Commission,* 73 Conn.App. 442, 807 A.2d 1089, *cert. denied,* 262 Conn. 928, 814 A.2d 379 (2002); *Daughters of St. Paul, Inc. v. Zoning Board of Appeals,* 17 Conn.App. 53, 549 A.2d 1076 (1988), *Grace Community Church v. Planning & Zoning Commission, supra,* 42 Conn.Supp. at 256, 615 A.2d 1092. Under the foregoing standard, any argument that these four reasons rise to the level of a compelling government interest would likely fail. Moreover, for the purposes of the present appeal, the court finds insufficient evidence in the record to support the commission's denial on the above grounds.

However, there are two other reasons that the commission cited for its denial of the special permit. Should the record disclose evidence that supports any one of the reasons, the court must dismiss the society's appeal. Those reasons are as follows:

***15** (4) *Section 8.04.740. The proposed use shall not create additional congestion or a traffic hazard on existing streets.*

(5) *Section 8.04.750. The proposed use shall not create a health or safety hazard to persons or property on or off the lot on which the use is proposed.*

The court will address each one of these denials separately.

*SECTION 8.04.740*

First, the denial as to Section 8.04.740, traffic conditions. The society presented a traffic study to the commission which the commission rejected finding it to be inadequate. In its denial letter (ROR# 4) the commission stated: "Boggs Hill Road is a small paved two-lane country road characterized as winding and narrow. The road is often used at speeds generally in excess of the posted limit. The neighbors report that, although police reports record about one accident a month, many accidents take place ..." The denial goes on to state: "The commission's concern is during a [f]estival's peak traffic period when multiple cars arrive at approximately the same time of each other from one direction or the other or even both directions at once then parking will begin to detain and slow other arriving vehicles on Boggs Hill Road ..." It also discussed the curves in the road and problem which have arisen due to the curves.

In *Bethlehem Christian Fellowship v. Planning & Zoning Commission, supra,* 73 Conn.App. at 470, 807 A.2d 1089, the court stated: "[T]he consideration that applies to zoning applications is not the overall volume of traffic, but whether the increase in traffic will cause congestion ... In addition, a land use agency cannot deny an application for a permitted use because of off-site traffic considerations." (Citations omitted.) *Id.*

The record does not support the board's conclusion that the proposed use could cause a detriment to the neighborhood by reason of traffic and congestion. A religious structure is a permitted use, an increase in traffic does result from same no matter where the church, synagogue or temple is located. The comments of the neighbors and first selectman regarding the dangers posed by additional traffic under the worst case scenario were based on speculation and did not rise to the level of substantial evidence.

The exploration of traffic and parking alternatives has particular bearing on a free exercise and RLUIPA individualized assessments analysis, but these issues also pertain to the second prong of the test "in which [the court] would seek to determine whether [the commission's] actions serve a compelling government interest through the least restrictive means possible." See *Murphy v. Zoning Commission,* 402 F.3d 342, 352 (2d Cir.2005).

No controlling authority exists, either in the Supreme Court or any circuit holding that traffic problems are incapable of being deemed compelling. *Westchester Day School v. Village of Mamaroneck, supra,* 386 F.3d at 191. "While it is true that there are no authoritative cases holding that a traffic concern satisfies the "compelling interest" test, nor are there authoritative cases holding that a traffic concern cannot satisfy the test." *Id.* Very few rulings discuss the question, none arising under RLUIPA. *Id.* Having determined that the society has not suffered a burden on its religious exercise, the court need not reach this issue in the context of the present appeal.

*SECTION 8.04.750*

***16** The last reason for the denial was the health and safety issue under Section 8.04.750.

When the commission denied the society's application, the commission contends that the septic system had yet to be approved and no adequate water supply was available for the property. The society argues that the commission should have conditioned approval on its obtaining of septic and water permits. For support, the society cites a letter from the department of public health stating that the septic system generally met the health code requirements, while the commission produces reports and testimony from environmental experts and a civil engineer identifying problems with the proposed septic system.

As a general rule, an application which is dependent for its proper functioning on action by other agencies and over which the zoning commission has no control should not be sustained routinely unless the necessary action appears to be a probability. See, e.g., *River Bend Associates, Inc. v. Zoning Commission,* 271 Conn. 41, 56, 856 A.2d 959 (2004) (discussing cases analyzing conditional approvals under a variety of zoning applications). The only consequence of a denial on this ground is that, once the society obtains the relevant permits, the society must either resubmit the current application or a modified plan. *Id.,* at 64, 856 A.2d 959.

In a case with two vigorous dissenting opinions, however, our Supreme Court recognized a distinction between special permits and other zoning applications. See *Lurie v. Planning & Zoning Commission,* 160 Conn. 295, 278 A.2d 799 (1971). The court noted that a "strict application of the rule ... to instances of exceptions and special use permits may often prevent desirable changes where the accomplishment of the change depends on cooperative or dependent action by the zoning authority and other municipal agencies over which it has no control. In such instances it is, of course, desirable, where feasible, that the [z]oning authority ascertain that there is a reasonable probability that such action will eventuate. In many circumstances, however, other municipal agencies may properly be reluctant to commit themselves to a course of action before knowing that if such a commitment is made it will meet such conditions as the [z]oning authority will deem advisable. Such a stalemate is clearly undesirable. Under such circumstances, where cooperative action is necessary to accomplish a desirable result, a stalemate can best be avoided by approval which may be conditional. [The court], accordingly, [held] that where an exception or a special permit is granted and the grant is otherwise valid except that it is made reasonably conditional on favorable action by another agency or agencies over which the zoning authority has no control, its issuance will not be held invalid solely because of the existence of any such condition." *Id.,* at 307, 278 A.2d 799.

The *Lurie* case, and the Superior Court cases interpreting it, all arise out of a third party's challenge to a zoning authority's decision to approve a special permit subject to subsequent approvals by other agencies. See, e.g., *Savin Gasoline Properties, LLC v. Planning & Zoning Commission,* Superior Court, judicial district of Norwich, Docket No. CV 124145 (January 10, 2003, Purtill, J.T.R.) (substantial evidence property would be hooked up to sewer line); *Mimms v. Planning & Zoning Commission,* Superior Court, judicial district of Fairfield at Bridgeport, Docket No. CV 028405 (June 11, 1993, Levin, J.) (9 Conn. L. Rptr. 159) (commission did not act illegally in conditionally approving special permit). None of the decisions review a zoning authority's discretion to deny an application for a special permit instead of granting conditional approval subject to subsequent agency approvals. Compare *Kaufman v. Zoning Commission,* 232 Conn. 122, 164, 653 A.2d 798 (1995) (zoning commission not merely authorized, but required to approve a zone change for affordable housing development conditioned on obtaining approval of coordinate agencies). The commission may consider general health, safety and welfare requirements in the regulations not only for the purpose of placing conditions on a special permit, but may also consider the requirements in determining whether to deny or grant the special permit. *Whisper Wind Development Corp. v. Planning & Zoning Commission,* 32 Conn.App. 515, 522, 630 A.2d 108 (1993), *aff'd,* 229 Conn. 176, 640 A.2d 100 (1994). See also *Mason v. Zoning Board of Appeals,* Superior Court, judicial district of New Haven, Docket No. CV 95 0373276 (December 14, 1995, Booth, J.). Inasmuch as the society has not demonstrated a prima facie case under the RLUIPA or the RFA, the court declines to determine whether the failure to grant conditional approval rises to the level of a compelling government interest. Under the ordinary judicial standard of review applicable to special permits, however, the court finds that the commission did not act illegally, arbitrarily or in abuse of its discretion when it denied the society's application.

*CONCLUSION*

***17** Reviewing the facts in the present appeal, the society's claim alleging a violation of the equal protection clause is unavailing because the court finds no evidence of selective

treatment. The court further finds the society has neither established a "substantial burden" nor a "burden" on religious exercise sufficient to meet its prerequisite burden for a claim under the RLUIPA or the RFA. As a final matter, the court finds insufficient evidence to determine that the commission's denial of the special permit, pursuant to substantial evidence in the record, was unreasonable, arbitrary, or illegal. The society's appeal is, accordingly, dismissed.

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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Connecticut,
Judicial District of Stamford-Norwalk at Stamford.

GREENS FARMS DEVELOPERS, LLC
v.
TOWN OF WESTPORT HISTORIC DISTRICT COMMISSION

FSTCV186035059S
|
April 29, 2019

**Opinion**

Hon. William A. Mottolese, Judge Trial Referee

***1** As the owner of property located in the Morningside Drive South Historic District in the town of Westport, the plaintiff filed an application with the defendant ("commission") seeking a certificate of appropriateness pursuant to G.S. § 7-147d to erect a single-family dwelling on the westerly side of 20 Morningside Drive South. The commission denied the application and the plaintiff has appealed alleging that (1) the commission had unlawfully predetermined the outcome, and (2) the commission's decision is not supported by substantial evidence in the record.

The plaintiff produced evidence at the aggrievement hearing that it has been the owner of the property at all times pertinent to the appeal. Therefore, the plaintiff is an aggrieved party. *Goldfeld v. Planning and Zoning Commission,* 3 Conn.App. 172 (1985).

The plaintiff alleges that the individual members of the commission had made up their minds to deny the application before the proceeding began. In support of that claim it moved to expand the record by including a newspaper article from the *Westport News* which appeared in an edition published on December 11, 2017 which is a date which preceded the hearings held by the commission on December 12, 2017 and January 9, 2018. After hearing, this court granted the motion in order to promote the equitable disposition of the appeal. G.S. § 8-8(k). On review of the plaintiff's briefs it is noted that while the plaintiff alleged predetermination at paragraph 9 of its complaint it failed to address the issue in its brief in chief. Likewise, the commission did not address the issue in its trial brief. Ordinarily, a failure to brief an issue raised in the complaint would constitute abandonment of that issue, *Connecticut Light and Power Company v. Department of Public Utility Control,* 266 Conn. 108, 120 (2003). The plaintiff briefed the issue for the first time in its reply brief which generally is not permitted. "It is a well-established principle that argument cannot be raised for the first time in a reply brief," *State v. Garvin,* 242 Conn. 296, 312 (1997). On the other hand, the commission did not request leave to file a brief in opposition nor did it offer any objection at trial to the court addressing the issue in its decision. In fact, the defendant joined the issue in its objection to the Plaintiff's Motion to Introduce Evidence wherein it did not challenge the authority of the court to entertain the issue. "We previously have afforded trial courts discretion to overlook violations of the rules of practice and to review claims brought in violation of those rules as long as the opposing party has not raised a timely objection to the procedural deficiency. See, e.g., *Pepe v. New Britain,* 203 Conn. 281, 285-86 (1987) (defendant's failure to file special defense in violation of rules of practice did not preclude consideration of that defense when plaintiffs failed to object." (Alternative citation omitted). *Schilberg Integrated Metals Corp. v. Continental Casualty, Co.,* 263 Conn. 245, 273 (2003). Accordingly, the court exercises its discretion in favor of consideration and adjudication of the issue primarily because the issue implicates public confidence in the proceeding of a quasi-judicial municipal agency. As an initial matter, the court notes that except for the document referred to above, the plaintiff has offered no additional evidence to support its claim but relies on the record before the commission. Because § 7-147i provides that the procedure governing this appeal shall be the same as for zoning appeals, it is appropriate to borrow from our zoning jurisprudence the principles which guide our courts in assessing whether the action of a zoning agency is the product of a predetermined bias. *Figarsky v. Historic District Commission,* 171 Conn. 198, 202 (1976). Procedurally, because a finding of predetermined bias depends upon many of the same parts of the record as does a determination on the merits, the two will be treated together. In order to create a foundation for resolution of these issues it is necessary to set forth certain well-established principles which guide the process.

Standard of Review: Predetermination

***2** "We presume that administrative board members acting in an adjudicative capacity are not biased." *Simko v. Ervin,* 234 Conn. 498, 508 (1995). "Neutrality and impartiality of members are essential to the fair and proper operation of a planning and zoning commission. *Lake Garda Improvement Assn. v. Town Plan & Zoning Commission,* 151 Conn. 476, 480 (1964). The evil to be avoided is 'the creation of a situation tending to weaken public confidence and to undermine the sense of security of individual rights which the property owner must feel assured will always exist in the exercise of zoning power.' *Bossert Corporation v. Norwalk,* 157 Conn. 279, 284 (1968). We have held that bias 'can take the form of favoritism toward one party or hostility toward the opposing party; it is a personal bias or prejudice which imperils the open-mindedness and sense of fairness which a zoning official in our state is required to possess.' *Anderson v. Zoning Commission,* 157 Conn. 285, 290-91 (1968). The decision as to whether a particular interest is sufficient to disqualify, however, is necessarily a factual one and depends upon the circumstances of the particular case." *Gaynor-Stafford Industries, Inc. v. Water Pollution Control Authority,* 192 Conn. 638, 648 cert. denied, 469 U.S. 932 (1984).

"We have held that [t]he law does not require the members of zoning commissions must have no opinion concerning the proper development of their communities. It would be strange, indeed, if this were true. *Furtney v. Zoning Commission,* 159 Conn. 585, 594 (1970). As the court noted in *In re J.P. Linahan, Inc.,* 138 F.2d 650, 651-52 (2d Cir. 1943), "[t]he human mind ... is no blank piece of paper ... Interests, points of view, preferences, are the essence of living ... An 'open mind,' in the sense of a mind containing no preconceptions whatever, would be a mind incapable of learning anything, [and] would be that of an utterly emotionless human being ..."

"Local governments, therefore, would be seriously handicapped if any conceivable interest, no matter how remote and speculative, would require the disqualification of a zoning official. Such a policy "would not only discourage but might even prevent capable men and women from serving as members of the various zoning authorities. Of course, courts should scrutinize the circumstances with great care and should condemn anything which indicates the likelihood of corruption or favoritism." *Anderson v. Zoning Commission, supra,* 291.

The decisive question, therefore, must be whether the challenged commissioners actually had made up their minds prior to the public hearing, regardless of any arguments that might have been advanced at the hearing. *Furtney v. Zoning Commission, supra,* 594. This issue involves a question of fact and the burden of proving that illegality was on the plaintiffs because the individual commissioners enjoy a presumption of impartiality, *Rado v. Board of Education,* 216 Conn. 541, 556 (1990). *Id.*, 594-95. (Alternative citations omitted.) *Cioffoletti v. Planning and Zoning Commission,* 209 Conn. 544, 553-55 (1989).

Because there is no direct evidence of predetermination and predisposition in this case the court must rely on circumstantial evidence gleaned from the record. "The burden of persuasion can be satisfied by circumstantial evidence if the trier finds that the facts from which the trier is asked to draw the inference are proved and that the inference is not only logical and reasonable but also strong enough so that it can be found to be more probable than not. *Terminal Taxi Co. v. Flynn,* 156 Conn. 313, 316 (1968)." (Alternative citations omitted.) Tait's Handbook of Connecticut Evidence, 3rd Ed. at 3.5.1., p. 140.

"It is not one fact but the cumulative impact of a multitude of facts which establishes liability in a case involving circumstantial evidence." *State v. Rodgers,* 198 Conn. 53, 58 (1985). "The trier of fact is not permitted to resort to speculation or conjecture." *State v. Stankowski,* 184 Conn. 121, 136 (1981). "There is no legal distinction between direct and circumstantial evidence as far as probative force is concerned." *State v. Haddad,* 189 Conn. 283, 390 (1983).

Standard of Review: The Merits

***3** The controlling question for a trial court reviewing the decision of a historic district commission is "whether the historic district commission ha[s] acted ... illegally, arbitrarily and in abuse of the discretion vested in it." (Internal quotation marks omitted.) *Felician Sisters of St. Francis of Connecticut, Inc. v. Historic District Commission,* 284 Conn. 838, 853 (2008), citing, *Figarsky v. Historic District Commission,* 171 Conn. 198, 202 (1976). The reviewing court must examine the record to determine whether it reveals substantial evidence that supports the reasoning and ultimate decision

of a historic district commission. *Felician Sisters of St. Francis of Connecticut, Inc. v. Historic District Commission, supra* at 853-54 and n.18; see, also, *Heithaus v. Planning and Zoning Commission,* 258 Conn. 205, 223 (2001). It is not the function of a reviewing court to "retry the case or substitute its judgment for that of the agency": *Smith v. Zoning Board of Appeals,* 227 Conn. 71, 80 (1993), *cert. denied,* 510 U.S. 1164 (1994); but to determine "whether the record before the [commission] supports the decision reached." (Internal quotation marks omitted.) *Geyers v. Planning and Zoning Commission,* 94 Conn.App. 478, 483 (2006). Although case law establishes that judicial review of administrative decisions is deferential, the statutory right to appeal must be meaningful. "[A] court cannot take the view in every case that the discretion exercised by the local [agency] must not be disturbed, for if it did the right of appeal would be empty ..." (Internal quotation marks omitted.) *Felician Sisters of St. Francis of Connecticut, Inc. v. Historic District Commission, supra,* 284 Conn. at 854; accord *Suffield Heights Corp. v. Town Planning Commission,* 144 Conn. 425, 428 (1957). It is well settled that, "[i]n appeals from administrative zoning decisions ... the decisions will be invalidated even if they were reasonably supported by the record, if they were not supported by substantial evidence in that record ... In an appeal from the decision of a ... [commission], we therefore review the record to determine whether there is factual support for the [commission's] decision ... Should substantial evidence exist in the record to support any basis or stated reason for the ... commission's decision, the court must sustain that decision." (Citations omitted; internal quotation marks omitted.) *Heithaus v. Planning and Zoning Commission,* 258 Conn. 205, 223 (2001). "Evidence is sufficient to sustain an agency finding if it affords a substantial basis of fact from which the fact in issue can be reasonably inferred ..." *Pelliccone v. Planning and Zoning Commission,* 64 Conn.App. 320, 326-28 (2001).

Analysis of the Record

As stated above, the question of whether the record contains substantial evidence to support the commission's denial of the certificate of appropriateness is intertwined with the question of predetermination and predisposition. The plaintiff's attack begins with the newspaper article from the *Westport Hour* mentioned above which is a weekly newspaper having a circulation in Westport. In that article the chairman of the commission, Randy Henkels, is quoted as follows: "This could be a landmark, precedent-setting interpretation of what's appropriate for a district," Henkel said. "Theoretically, we could say that's not appropriate, that's not appropriate, that's not appropriate, depending on what they propose and if they don't propose anything that we deem to be appropriate."

The record reveals that the plaintiff presented to the commission a series of nine different designs for the dwelling over the course of three meetings, each of which the commission rejected for two principal reasons. The commission determined that none of the versions submitted would preserve first, a desirable streetscape view of a significant artists' studio and secondly, the pastoral meadow on which it is located. [1]

1 The commission made fourteen findings of fact and gave four reasons for the denial which are as follows:

1. The District was created for the express purpose of maintaining the existing farmhouse and studio juxtaposed on either side of a pastoral meadow. The proposed house location would destroy that juxtaposition and would eliminate any meaningful views of the meadow and the studio from Morningside Drive South.
2. The applicant's decision to re-draw the lot lines severely affects and limits its ability to develop 20 Morningside Drive South in a way that maintains the integrity and purpose of the District.
3. The location and size of the proposed house are inappropriate for the District and inconsistent with the purpose and significance of the District.
4. The pastoral meadow would be destroyed.

The artists' studio was built in 1970 by Walter and Naiad Einsel who were prominent artists whose work contributed to Westport's art history. At that time the studio served as an accessory use to the Einsel's dwelling, both of which were situated on a single lot of roughly 3.1 acres known as 26 Morningside Drive South (hereinafter #26). In 1988 the Einsels carved out a "first cut" building lot known as 20 Morningside Drive South (hereinafter #20) which consisted of .508 acres. 20 Morningside Drive South was configured in such a way as to leave the studio on the same parcel as the dwelling house leaving the lot on which the dwelling is located with 2.67 acres, more or less. The same year, after the death of her spouse, Naiad Einsel applied to the commission and received approval to have both properties included in a newly created historic district. At that time the

commission identified both the studio and the meadow has having historical significance.[2] At some point thereafter the plaintiff acquired both #20 and #26 Morningside Drive South and in so doing elected to revise the existing lot lines so as to eliminate #20 and create a new #20 which instead of running parallel to the street now runs perpendicular to the street with frontage of 104.0 feet and a depth of 345.5 feet. #20 and #26 now share a westerly boundary. The stated reason for the revision was "the presence of wetlands at the rear of the property."

2 Findings #6 and #7 state the following:

> 6. The HDC finds that the basic nature of the District is that of a rural environment. The District remains as a remnant of the historically agrarian character of the Greens Farms area of Westport.
>
> 7. The Study Report, prepared for the designation, makes reference to a unified site as an important factor in the District. The studio is also considered an important component of the District.

***4** The plaintiff makes no claim that neither the studio nor the meadow were beyond the commission's purview to protect. As the court understands the plaintiff's argument it is that the articulated reasons are arbitrary and capricious because they were pretextual to the real reason the commission denied the application. Specifically, the plaintiff charges that the real reason for the denial was that the commission preferred the former configuration of Lot 20 which it believed would better preserve an unobstructed view of the studio from the street and the meadow on which it sits.

While the commission steadfastly maintained throughout the proceeding that approving or disapproving revised lot lines is not its function but belongs to the planning and zoning commission, nevertheless it is obvious that the commission concluded that the new lot configuration created an unacceptable alternative. Notwithstanding, the commission made no effort to cajole the plaintiff into reverting back to the former lot lines[3] presumably because the plaintiff no longer owned enough of the remainder of that lot to comply with zoning requirements, although such is not clear from the record. Thus, there seems to be no support for the notion that the voluntary act of a property owner in changing lots lines which results in the loss of a preferred site should place it at a disadvantage before the commission. While § 7-147g confers zoning like authority on a historic district commission to grant a variance upon proof of hardship, the issue was never before the commission because the plaintiff did not seek a variance simply because it believed that its proposal did not impinge upon any protectable historic feature.

3 Observing zoning setbacks, a simple scaling exercise reveals that the former lot could accommodate a house roughly 50 feet by 100 feet wide which could be sited so as to avoid substantially obstructing the view of the studio.

The Studio

It is undisputed that the plaintiff had no intention of altering the studio in any way nor is there any sense that the commission disapproved of the architectural style of the dwelling which the plaintiff proposed to build. The commission's objection is that the house is simply too big for the site with the result that it obscures visibility of the studio from the street and disturbs the unified appearance of the meadow.

Clearly § 7-147a defines "exterior architectural features" as "such portion of the exterior of a structure or building *as is open to view from a public street, way or place*." (Emphasis added.) Therefore, the power to control exterior architectural features necessarily includes the preservation of the view of such features. In *Gibbons v. Historic District Commission*, 285 Conn. 755, 764 (2008) our Supreme Court made it clear that the authority of a historic district commission extends to consideration of the relationship of a building or structure to a place of historic significance. The court did not limit a historic district commission to the factors which are enumerated in the statute but broadened the scope of the commission's authority to "other pertinent factors in determining whether the changes proposed will be incongruous with the aspects of the historic district which the historic district commission determines to be historically or architecturally significant." This court notes that from the photograph in the record, which was greatly enlarged as an aid to the court, it is obvious that the architectural features of the studio are materially different from those of the main house to the extent that it very likely would be considered "incongruous"[4] with it if a certificate of appropriateness to build it were sought from the commission today.

4 "Incongruous" which is not defined in G.S. Sec. 7-147f(b) is defined as "lacking harmony or agreement; incompatible." Webster's New World Dictionary 2d. Coll. Ed. at 712.

***5** The handbook of the Westport Historic District Commission, 3rd Ed. (2009) states: "As the authority having jurisdiction for designated Local Historic Districts and Local Historic Properties, the HDC governs *all construction activities* that would be visible from any public way *in the absence of planting*." (Emphasis added.) Implicit in this statement reveals the commission's recognition that a streetscape may in some cases be totally obscured by vegetation. This statement could also reasonably be interpreted as applying only to "construction activities" and not to existing structures although there is no need for the court to reach this issue. What is significant about the reference to "planting" is that it seems to imply clearly that a streetscape may lawfully be visually obstructed by the planting of high growing vegetation. "Incongruity" under G.S. § 7-147f(b) then is the key consideration which requires the court to assess whether the commission's unrelenting insistence on a smaller structure would promote or compromise that principle.

It is readily apparent from a review of the hearing transcripts that the size or massing of the proposed dwelling was the overriding factor which led to the denial of the nine iterations which the plaintiff submitted. The court notes that the final design called for a dwelling of 5,240 square feet in size. Since the historic district consists of only one dwelling and an architecturally dissimilar studio, the congruity test applies not to the studio but to the dwelling at #26. The architect's rendering graphically shows a home design that is strikingly similar to the Einsel dwelling and is visually proportionate to it both in size and massing. Thus, there is no evidence in the record to support the finding that the size of the house is inconsistent with the purpose of the district when compared to the Einsel house. [5]

5 The plaintiff's argument which is based on a comparison of its proposed dwelling with other dwellings in the neighborhood is unavailing simply because the other dwellings are not part of the historic district.

As mentioned above, the expressed preference of the commission was to have the plaintiff reduce both the size and location of the proposed dwelling. Examination of the drawings reveals that if the size of the proposed house were reduced so that it did not obstruct the view of the studio at all, it clearly would be incongruous in its size with the Einsel house for the reason that follows. It can be seen from the survey that 104.5 feet of frontage would require that a house built to provide a full frontal view of the studio could be no wider than twenty feet given the mandated side yard setback of fifteen feet. Such a house would resemble a railroad car and would be blatantly incongruous with the existing historic house. [6] Because such a result should have been obvious to the commission, the court is left to infer that the application was denied not because the new house would be too large but rather because the plaintiff elected to abandon construction on the former Lot 20 where construction of a non view-obstructing house could have been built. The court is aware of no authority which authorizes a historic district commission to deny a certificate of appropriateness for new construction because the owner, for whatever reason, decides to revise lot lines and reorient a house location. In other words, the court concludes that the expressed reason for denial was pretextual and therefore arbitrary. [7]

6 At trial, the commission's counsel argued that the plaintiff should "cut the size in half." Such a reduction would produce a long, narrow, rectangular structure with ends facing front and rear in comparison to the main house which is 65 feet by 45 feet.

7 The court observes that the commission's own guidelines at page 7-5 state that "massing shall be consistent with existing structures" and at page 7-4 "appropriate new design will generally be consistent in size with immediately adjacent buildings." Because the studio is an accessory building it could never be consistent in massing with the proposed dwelling. Reference to existing structures must therefore be limited to the Einsel house.

The Pastoral Meadow

***6** In addition to objectionable size and location the commission found that the construction as proposed would destroy the pastoral meadow which the commission associated with Westport's farming history. The commission argues and the court agrees that the preservation of the meadow falls within the commission's power to regulate. G.S. § 7-147p specifically includes significant *sites* within

the meaning of historic property. National Park Service guidelines which the commission's handbook references acknowledge that streetscapes are important to the integrity to the historic districts. *Concerned Citizens Alliance, Inc. v. Slater,* 176 F.2d 286, 697 (3rd Cir. 1999), see also *Smith v. Zoning Board of Appeals of Greenwich,* 227 Ct. 71 (1993).

The meadow to which the commission refers consists of the proposed building site as well as the rear and side yards of #26. The commission's findings make it clear that it believes that the meadow should remain integrated with the studio as well as the adjacent rear and side yards of #26. In order to accomplish this, the plaintiff would be required to reinstate the former lot lines so that the studio which is located in the meadow would remain in the same ownership as #26. Thus it becomes evident that the underlying reason for the denial is that the present lot configuration, regardless of the size of the new house, disturbs the unified character of the meadow and the studio with #26 which would not occur if the plaintiff had not abandoned the former lot lines. However, the commission's solicitude for unification and integrity of the three features (#26, the studio, meadow) together is illusory. When one considers that residential development of the original lot #26 would have a similar effect because the meadow would become the northerly side yard which could then be devoted to normal household purposes such as parking of cars, children's playground and landscaping without limitation, each of which would obstruct the view and destroy the meadow. As noted above at page 10, the commission's own guidelines exempt plantings from its regulatory sweep and therefore recognize such a possibility.

Common sense would suggest that a hierarchy of statutorily recognized preservable features is possible in a historic district, ranging from the total demolition of a historic structure which is forever irrevocable [8] to a streetscape which by its very nature is subject to change by forces of nature as well as the action of man, e.g. planting view-obstructing foliage. Consequently, to avoid arbitrariness, the degree of regulation must vary from the strictest in the former example to a more relaxed treatment in the latter example. This is especially true in the present case where in 2007 this commission created the historic district with full knowledge that the meadow located in then vacant Lot 20 might someday become the side yard of a house that might be built in the future. [9]

8 Westport has the following demolition ordinance which especially reflects the town's concern over forever losing a putatively historic structure as well as the high position which demolition of a historic structure occupies in the inventory of protectable subjects. "The purpose of this ordinance is to authorize the Town of Westport, as allowed by C.G.S. § 29-406(b), to impose a waiting period of not more than 180 days before granting a demolition permit for certain structures of architectural, historical, or cultural importance. The objective of this ordinance is to promote the cultural, economic, educational and general welfare of the Town of Westport by establishing a process whereby the owners of buildings with significant historic, architectural or cultural characteristics will be informed of the benefits of historic preservation, rehabilitation and reuse of such buildings and structures. The waiting period will provide time for all interested parties to consider and put forth alternatives to demolition."

9 In fact, the record of the 2007 proceeding reflects that the commission as then composed recognized the distinct possibility that Naiad Einsel might wish to sell the lot at some time in the future.

The Streetscape View

*7 As for the streetscape view, the plaintiff repeatedly demonstrated to the commission that the studio would remain open to public view from the street to pedestrians and vehicle occupants approaching from the north but would be significantly obscured to vehicle occupants approaching from the south. The commission's insistence that the studio and meadow remain totally unobstructed to public view from the street was arbitrary and unreasonable when the effect of such insistence was to deny construction of a dwelling which is architecturally harmonious with #20. [10] Moreover, there was no substantial evidence in the record to support the commission's implicit finding that denial of the application was necessary to protect either the studio or the meadow on which it is located both of which will continue to exist as a rear and side yard to the Einsel dwelling.

10 The commission's counsel suggested at trial that a glass house might be appropriate. Such a statement underscores the capriciousness of the commission's

action for such a structure would obviously be incongruous with the district.

Predetermination: The Record

The court turns now to the question of whether the overall record demonstrates that the commission had made up its mind that it would not approve any structure which interfered with the unobstructed view of the studio from the street or unduly disturb the meadow. The presumption of fairness accorded to members of administrative agencies is based on the belief that in executing their official duties they will act fairly with proper motives upon valid reasons and not arbitrarily, *Villages, LLC v. Longhi,* 161 Conn.App. 685, 702 (2016). To put it another way, "neutrality and *impartiality* of members are essential to the fair and proper operation of zoning commissions." *Cioffoletti v. Planning and Zoning Commission,* 209 Conn. 544, 549 (1989). (Emphasis added.) The fact that the commission is a historic district commission makes no difference. The *Cioffoletti* court's use of the term "impartiality" invites application of the test for "evident partiality" which applies to judicial review of the doings of arbitration panels. Our courts have opined that the "evident partiality test is satisfied if a reasonable person would have concluded that the member or members were partial to one or the other" (in this case, approval or disapproval). *Vincent Builders, Inc. v. American Application Systems, Inc.,* 16 Conn.App. 486, 495 (1988).

As a threshold issue it is noteworthy that the commission has not argued that the plaintiff has waived any claim of predetermination by not raising that claim before the commission. "A claim of disqualifying bias or partiality on the part of a member of ... an administrative agency must be asserted promptly after knowledge of the alleged disqualification. Moreover, we will not permit parties to anticipate a favorable decision, reserving a right to impeach it or set it aside if it happens to be against them, for a cause which was well known to them before or during the hearing." *Moraski v. Connecticut Board of Embalmers and Funeral Directors,* 291 Conn. 242, 262-63 (2009). However, this waiver rule does not apply where a party has no knowledge of the facts which form the basis for the waiver, as was the case here where such knowledge could not have been gained until the last of the nine submissions was rejected. *Morelite Construction Corp. v. New York City District Council Carpenters Benefit Funds,* 748 F.2d 79, n. 5 (2d Cir. 1989). With that foundation the court now looks to the specific facts which lead to the conclusion that the members of the commission had not just preconceived ideas about the plaintiff's application but had predetermined the result. They are as follows:

(1) By his public statement on the day before the initial hearing the chairman set a negative tone by suggesting that no matter what the plaintiff submitted the commission could deny approval repeatedly. This statement though not itself evidence of bias nevertheless created an environment in which the applicant was placed at a disadvantage from the outset. [11]

11 Unlike other land use agencies which deal with zoning amendments, special permits, variances and wetland permits, the statutory standard of congruity (G.S. sec. 7-147f(d)) lends itself to subjective considerations which are generally not present in the deliberations of these other agencies.

***8** (2) The plaintiff submitted nine different versions of its house design, each time attempting to reduce the scale and massing of the structure as well as modifying its design in an effort to satisfy the commission's preferences. In rejecting each of the submissions, not once did any commissioner suggest any guidance to enable the plaintiff to meet the commission's objection. In fact, the record is replete with statements by various commissioners that it was not the commission's function to express design or size preference, thus keeping the plaintiff uninformed. This position is contrary to the spirit of the commission's own guidelines. At page 6-2 the commission itself embraces the notion of mutual cooperation between applicant and the commission itself by encouraging the applicant to attend a pre-application meeting with the commission the primary purpose of which is for *the commission* to offer "advice on matters of appropriate design and suggestion of resources for consultation by the applicant." With such a guideline it is fundamentally unfair for the commission to withhold advice on design and style and to refuse to approve all nine versions submitted when the underlying reason for denial was the unacceptable lot line realignment. In this court's view, denial of the nine unacceptable designs was a subterfuge for the commission's disdain for the plaintiff's exercise of its property rights in realigning the lot lines.

While there is abundant decisional law which governs successive land use applications where the land use agency has reversed itself there is little case law relevant to the specific situation which exists here. In an important case

on the issue of regulatory taking a useful analogy may be drawn to the present case. In *Gil v. Inland Wetlands and Watercourses Agency,* 219 Conn. 404 (1991) the plaintiff claimed that the defendant's denial of four applications for a wetlands permit for a single-family house was confiscatory. The court held that the plaintiff must prove that the agency would not allow any reasonable residential development of his property. The court found that the wetlands portion of his property should have warned the plaintiff that development would be difficult and that more than one plan would have to be submitted to the agency. The court noted that "[r]ejection of exceedingly grandiose development plans does not logically imply that less ambitious plans will receive similarly unfavorable reviews." *Id.* at 417. Applying this rigorous standard to the facts of the present case, it can hardly be said that the plaintiff's plan is in any way grandiose. Bearing in mind that the proposed house location has been approved by the appropriate zoning and wetlands authorities, its design is anything but grandiose. In fact, the design is entirely in keeping with the former Einsel home in style, size and massing. Indeed, it is remarkably similar in its features. The consistent pattern of rejection when considered in conjunction with its thinly veiled preference for the former lot configuration partiality.

(3) The voluminous which make it crystal clear that they would not approve any plan which (a) interferes with an unobstructed view of the studio and (b) disturbs the pastoral meadow in such a way as to distort the appearance of unity between #26 and the studio by placing them in separate ownership. [12] The following are just a few of a multitude of examples of bias against any such plan. [13]

12 The commission never explored with the plaintiff the feasibility of either moving the studio to the northerly side yard of property #26 or creating a permanent easement wherein #26 would become the dominant estate with respect to the studio, either which may have been a reasonable and prudent alternative to denial.

13 References are to pages in the record.

P. 220 Chairman Henkels—"Not totally but largely blocked from view from the street. You are placing your structure right in main sight line."

P. 272 Chairman Henkels—"The studio is being overwhelmed by the new construction." Commissioner Braun —"There is no doubt about it. It overwhelms the studio."

P. 397 Commissioner Harding—"They (Einsels) wanted the studio to be visible, have optics and coordinate with their house."

P. 400 Chairman Henkels—"This structure is so big it overwhelms the studio."

P. 406 Chairman Henkels—"It (new house) makes it very hard to see it (studio)."

P. 407 Colloquy between Commissioner Henkels and applicant's architect Mr. Cugno:

***9** Mr. Cugno: "I'm curious. In what aspect is it not compatible so I know for reference.

Mr. Henkels: Basically size. It's much too big and it completely—

Mr. Cugno: Big in which way?

Mr. Henkels:—obscures—

Mr. Cugno: In height, or in width, in—

Mr. Henkels: In every dimension, mass.

Mr. Cugno: Because the last time the thoughts that I heard were it was too boxy, which it's not now; it's too tall, which we've lowered by five feet and took an upper story off of this; so I'm curious on what else?

Mr. Henkels: I think the consistent reaction has been that it's been too big. All of the schemes. You put a lot of effort into these schemes, but they haven't really gotten very much smaller."

P. 408-09 Colloquy between Mr. Ury, plaintiff's counsel and commissioner Henkels:

Mr. Ury: Can I just make one comment. Because based on what I've heard from the last three meetings—my name is Fred Ury and part of the team here—what I keep hearing—because we've come with a number of different designs and this design is a much smaller design on anything that we've

had—is I think we go back to the comment where I think there's nothing that we can propose to you that is going to get built on this property because you don't want anything built.

Mr. Henkels: You keep asking that question but I don't think we're answering it that way.

Mr. Ury: I don't think that. I think you are:

Mr. Henkels: I keep saying that I believe there is a solution to this.

Mr. Ury: Well, it can't be a—it can't be a 1,000-square-foot house or a 2,000-square-foot house.

Mr. Henkels: Who says that?

Mr. Gerber: Why not?

Mr. Henkels: Why not?"

More specifically, these quotations demonstrate from start to finish that the commission had no intention of approving any structure which obstructed the view of the studio in any significant measure. Thus, reference to a smaller structure was disingenuous because the commission knew or should have known that a smaller structure built in compliance with zoning setbacks which would afford an unimpeded view of the studio would have produced a railroad car style building which would have been grossly incongruous with the size and style of #26. Additionally, remarks such as "it will overwhelm or overtake the studio" reflects an unwillingness to acknowledge that principal residential uses under zoning by their very nature overtake accessory uses in size and bulk.

To summarize, the court concludes that the commission acted arbitrarily, capriciously and in abuse of its discretion in denying the plaintiff's application because its reasons for denial were not supported by substantial evidence and the absence of substantial evidence gives rise to the inescapable inference that its decision was the product of a predetermined course of action. Accordingly, the appeal is sustained.

**All Citations**

Not Reported in Atl. Rptr., 2019 WL 2371894

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KeyCite Yellow Flag - Negative Treatment
Distinguished by Kennie v. Natural Resource Dept. of Dennis, Mass., July 10, 2008

37 Mass.App.Ct. 639
Appeals Court of Massachusetts,
Bristol.

K. HOVNANIAN AT TAUNTON, INC.

v.

CITY OF TAUNTON & others. [1]

1 The town of Dighton; the mayor of Taunton; the commissioner and assistant commissioner of the Taunton department of public works. Actions against five other original defendants, who are not parties to this appeal, were dismissed prior to trial.

No. 93–P–465.
|
Submitted April 14, 1994.
|
Decided Nov. 21, 1994.
|
Further Appellate Review Denied Jan. 4, 1995.

**Synopsis**
Real estate developer brought action against city, town, and related defendants, asserting that defendants improperly denied developer sewer connection permit for proposed residential subdivision in city respecting intermunicipal sewer system, and seeking declaratory relief and asserting civil rights claims. The Superior Court, Bristol, John A. Tierney, J., entered judgment against city and its mayor on civil rights claims and issued declaratory judgment against developer. Developer appealed, and city and mayor cross-appealed. The Appeals Court, Jacobs, J., held that: (1) statute affording landowners right to connection with municipal sewer system did not apply to intermunicipal sewer system under arrangement between city and town and, thus, developer was not entitled, absent town's approval, to sewer connection permit, and (2) developer was not entitled to relief under state civil rights statute.

Affirmed in part and reversed in part.

**Procedural Posture(s):** On Appeal.

West Headnotes (6)

[1] **Municipal Corporations** Right or Obligation to Connect; Fees

Statute affording landowners right to connection with municipal sewer system did not apply to intermunicipal sewer system under arrangement between city and town and, thus, real estate developer was not entitled, absent town's approval, to sewer connection permit for proposed residential subdivision in city respecting connection to sewer line that connected with town's sewer system, which eventually deposited sewage into city's sewer system under intermunicipal sewer agreement, which limited arrangement respecting sewer line to prospective development of another preexisting subdivision. M.G.L.A. c. 83, § 3.

1 Case that cites this headnote

[2] **Municipal Corporations** Right or Obligation to Connect; Fees

Statute affording landowners right to connection with municipal sewer system does not apply to other than independent sewer system established within territory of municipality. M.G.L.A. c. 83, § 3.

1 Case that cites this headnote

[3] **Constitutional Law** Water, sewer, and irrigation

**Municipal Corporations** Right or Obligation to Connect; Fees

Real estate developer was not entitled to relief under state civil rights statute based on city's denial of sewer connection permit for proposed residential subdivision respecting intermunicipal sewer system and city's refusal to approve developer's subdivision plan, despite contention that developer was denied due process; developer had no statutory right to connect into street sewer line and had no constitutional right to favorable exercise of municipal discretion with respect to such

connection, there was no corrupt or egregious conduct that so shocked the conscience as to give rise to due process claim, and subdivision plan did not meet approval requirements. U.S.C.A. Const.Amend. 14; M.G.L.A. c. 12, § 11I; c. 83, § 3.

8 Cases that cite this headnote

[4] **Civil Rights** Right of Action; Nature and Grounds

Central to proof of violation of state civil rights statute is existence of right secured by Constitution or laws of United States or of Commonwealth. M.G.L.A. c. 12, § 11I.

2 Cases that cite this headnote

[5] **Constitutional Law** Particular issues and applications

For purposes of due process claim, no "property" interest is involved in approval of subdivision plan. U.S.C.A. Const.Amend. 14.

2 Cases that cite this headnote

[6] **Constitutional Law** Property Rights and Interests

Existence of property interest is necessary prerequisite to Fourteenth Amendment due process claim alleging deprivation of property interest. U.S.C.A. Const.Amend. 14.

2 Cases that cite this headnote

**Attorneys and Law Firms**

**1045 M. Frederick Pritzker, Boston, for plaintiff.

Kevin J. McAllister & Edmund J. Brennan, Jr., Taunton, for City of Taunton & others.

David T. Gay, Town Counsel, for Town of Dighton.

Before ARMSTRONG, DREBEN and JACOBS, JJ.

**Opinion**

*640 JACOBS, Justice.

The plaintiff Hovnanian, a real estate developer, filed a complaint in the Superior Court in 1988, principally asserting that the defendants improperly denied it a sewer connection permit for a one hundred and fifty-four unit single-family subdivision which it proposed to establish on the Taunton portion of a 138.76 acre tract of land, [2] a nine-acre segment of which is located in Dighton. In addition to declaratory relief, Hovnanian sought damages in a jury trial under G.L. c. 12, § 11I, for violation of its civil rights.

2 At all pertinent times, Hovnanian held an option to purchase the land from the owner, Leonard Reed.

As determined by the judge in comprehensive and detailed findings following trial, the sewer line to which the plaintiff sought access is located in South Walker Street, a public way in Taunton, and was constructed in 1986 by another developer to serve a seventy-home development on the opposite side of South Walker Street from the plaintiff's proposed subdivision. The South Walker Street line has no direct connection to the Taunton sewer system. At its southerly terminus it ties into the Dighton sewer system **1046 which is connected, at another location, to the Taunton system and ultimately the Taunton wastewater treatment plant.

Two agreements govern the relationship between Taunton and Dighton with respect to their intermunicipal sewer system. One, dated January 3, 1979, allows Dighton to send sewage from its system through Taunton sewer lines to Taunton's wastewater treatment plant and provides for payment by Dighton for this accommodation. It also provides that either Taunton or Dighton may utilize any unused capacity in the Taunton treatment facility. The judge found that this agreement "did not contemplate or refer to sewage passing through the Dighton system where the sewage had originated in Taunton."

The second agreement between the municipalities is dated April 24, 1986, and incorporates an earlier agreement between the developer who constructed the South Walker Street line and the Dighton sewer commission. That earlier agreement, dated March 13, 1986, in addition to permitting *641 connection of the South Walker Street line into the Dighton sewer system, limited to seventy the number of subdivision homes which the contracting developer might

connect to that line in Taunton and provided for a fee to be paid to Dighton for each connection. Fifty-four homes, including a few located outside of that development, were tied into the South Walker Street line as of the time of trial. The April 24, 1986, agreement "sets forth a system to measure and to credit Dighton for sewage which flows from Taunton into Dighton" and for its related operational costs.

In combination, the municipal agreements result in Dighton not incurring any net expense for its acceptance of sewage from Taunton, and being obliged to pay Taunton only for Dighton generated sewage treated at Taunton's treatment plant. The agreements are silent as to Taunton's right to condition connections to the South Walker Street line on Dighton's approval or Dighton's right to veto such a connection or to refuse to accept sewage from that line.

When Hovnanian inquired about connecting its proposed subdivision into the South Walker Street line in Taunton, it was informed by Taunton officials that Dighton first would have to agree to accept sewage from that development before Taunton could issue the requisite connection and extension permits (see note 3 *infra* ). The parties do not contest the judge's finding that "[n]o Taunton ordinance, by-law or regulation requires Taunton, before authorizing a sewer connection in Taunton to the South Walker Street Sewer Line, to ascertain that Dighton's approval has been obtained." Hovnanian thereafter sought and ultimately was refused Dighton's permission to connect into the intermunicipal sewer system in either Dighton or Taunton. The judge found that Dighton's decision "was not predicated upon concerns with the adequacy of physical capacity of the intermunicipal sewer system to service the [plaintiff's] development nor upon any potential developments in Dighton brought to its attention. Rather, it was based upon political considerations including the unpopularity of the development and the desire ***642** to be responsive to a hostile public which vigorously opposed it."

At trial, there was testimony that certain Taunton officials, i.e., the defendant mayor, and one Herman Ferreira, a predecessor of the defendants commissioner and assistant commissioner (note 1, *supra* ) and certain Dighton officials, had interfered with or attempted to interfere with Hovnanian's obtaining the requisite sewer permits. There was also testimony that the mayor told Hovnanian that given the public opposition to its development, he would instruct the Taunton city council to deny a sewer connection permit. Also, there was evidence of unsuccessful efforts on the part of Dighton to have Hovnanian donate land to the town in exchange for its approval of the sewer connection. There was also evidence that the Taunton planning board had rejected Hovnanian's application pursuant to G.L. c. 41, §§ 81K to 81GG, for approval of its subdivision plan and that a judge of the Land Court, in a separate action, had ruled that the planning board's decision exceeded its authority. The Land Court judgment was on appeal to this court at the time of trial and was later reversed in ****1047** *K. Hovnanian at Taunton, Inc. v. Planning Bd. of Taunton,* 32 Mass.App.Ct. 480, 590 N.E.2d 1172 (1992).

1. *The trial results.* After trial, the judge declared that G.L. c. 83, § 3, did not apply to the intermunicipal sewer system shared by Taunton and Dighton and that each municipality's permission was a necessary condition to the other's approval of Hovnanian's application for sewer connection and extension permits. [3] A jury found against both municipalities, the mayor, commissioner, and assistant commissioner on the civil rights claims and awarded Hovnanian damages ***643** in the amount of $500,000. [4] Following the jury verdict, the judge allowed the motions of Dighton, and the commissioners for judgment notwithstanding the verdict and denied similar motions by Taunton and the mayor. Hovnanian appealed from the ensuing declaratory judgment, and Taunton and the mayor cross-appealed from the civil rights judgment which was entered on the jury's verdict. [5] Dighton filed a cross-appeal from the judge's denial of its motion for a new trial that was filed together with its motion for judgment notwithstanding the verdict. [6]

3 In addition to the sewer connection issue, there is a parallel issue of the alleged refusal of Dighton and Taunton to sign an application for a sewer extension permit to the State division of water pollution control under G.L. c. 21, § 43(2). The intermunicipal agreements also are silent on such a permit. The judge found no relationship between this statute and G.L. c. 83, § 3. In any event, our decision makes unnecessary any resolution of this issue, since Dighton's proper disapproval of the sewer connection renders moot any question relating to the extension permit.

4 The jury, by special verdict, found that the defendants interfered in bad faith with secured rights of Hovnanian by threats, intimidation, or coercion. They also found for the mayor on counts alleging interference with Hovnanian's contractual

and advantageous relations with the owner of the land in question. No appeal is taken from that part of the judgment based on those verdicts.

5 The judge, on separate findings and rulings, included costs and attorneys' fees in the amount of $199,682.67, in the judgment against Taunton and the mayor.

6 Dighton's appeal was conditioned on the judgment notwithstanding the verdict, which was entered in its favor, being reversed or vacated on appeal.

[1] 2. *Declaratory relief.* Hovnanian argues that the judge erred by declaring that G.L. c. 83, § 3, does not apply to an intermunicipal system such as that here in issue. The pertinent part of that statute states: "if the owner of ... land shall make to the board or officer having charge of ... sewers application to connect his land with a common sewer, such board or officer shall make such connection." This provision has been construed as establishing a "present legal right" to a connection so long as the resulting added sewage does not pose an immediate risk of overloading the existing system. *Clark v. Board of Water & Sewer Commrs. of Norwood,* 353 Mass. 708, 710–711, 234 N.E.2d 893 (1968). Neither Dighton nor Taunton contends that the connection sought by Hovnanian would overload their sewage systems.

[2] Whether read separately or in the context of the overall statutory scheme, § 3 reasonably cannot be construed to apply to other than an independent sewer system established ***644** within the territory of a municipality. [7] See the first sentence of G.L. c. 83, § 1, as appearing in St.1964, c. 736, § 2 ("A city ... may lay out, construct, maintain and ****1048** operate a system or systems of common sewers ... for a part or the whole of its territory...."). There is, however, statutory authority for municipalities to contract with one another to deal with sewage disposal. [8] Accordingly, we direct our analysis to the agreements between Taunton and Dighton. While silent as to Taunton's obligation to condition additional connections to the South Walker Street line on Dighton's approval or Dighton's right to veto that connection, those agreements nevertheless implicitly and logically give rise to that obligation and right.

7 General Laws c. 83, § 3, provides:

> "The board or officers of a city or town having charge of the repair and maintenance of sewers may, upon request of the owner of land and payment by him of the actual cost thereof, construct a particular sewer from the street line to a house or building. A town may appropriate money for connecting estates within its limits with common sewers, and no estate shall, in any year in which such an appropriation is made, be connected with a common sewer except in the manner hereinafter provided. If bonds or notes are issued to pay the cost of making such connections, the assessments provided for in section twenty-four shall be applied to the payment of such bonds or notes. If the board of health of a town making such appropriation shall order land abutting upon a public or private way in which a common sewer has been laid to be connected with such sewer, or if the owner of such land shall make to the board or officer having charge of the maintenance and repair of sewers application to connect his land with a common sewer, such board or officer shall make such connection."

8 The pertinent provisions of two relevant statutes are:

> "A city [if locally authorized] may make contracts with ... any other city [or] town ... with regard to the operation, repair and maintenance of the physical properties of its system or

> systems of sewers...." G.L. c. 83, § 1, as amended through St.1992, c. 343, § 3.
> Prior to St.1989, c. 687, § 7, G.L. c. 40, § 4, second par., provided: "[A city may contract] [f]or the construction of sewers, sewerage systems, and sewage treatment and disposal facilities, for making connections, thereto, and for the collection, treatment, and disposal of sewage, with one or more other governmental units...."

***645** The judge correctly concluded that the 1979 agreement "did not contemplate or refer to sewage passing through the Dighton system where the sewage had originated in Taunton." Its focus is the provision of treatment capacity in Taunton for sewage originating in Dighton. Conversely, the 1986 agreement between the municipalities recognizes, in effect, the existence of a limited right of Taunton akin to an equitable easement, see *Baseball Pub. Co. v. Bruton*, 302 Mass. 54, 58, 18 N.E.2d 362 (1938), to deposit sewage into the Dighton sewage system. That agreement, by its specific preamble clauses, indicates that the homes benefiting from its provisions are those alluded to in the related agreement between Taunton and the developer who constructed the South Walker Street line. The latter agreement expressly limits the number of homes to be tied into that line to seventy.

To allow the general provisions of G.L. c. 83, § 3, to operate so as to override the specific limitations of the 1986 agreements, would encroach on the jurisdiction of Dighton by permitting the residual capacity of sewage lines owned and maintained by it to be reduced not by development within its borders, but by connections located in and authorized by Taunton. That Taunton, through the 1979 agreement, has theoretically exposed itself to reduction of its unused line capacity by sewage flow resulting from additional development within Dighton, does not, in the absence of express agreement, make true the converse.[9] Dighton has not bargained away its right to refuse sewage from Taunton, except for that generated by the seventy homes originally expected to tie into the South Walker Street line.

9 We intimate no opinion as to the mutual susceptibility to developmental limitations which theoretically may arise from fully integrated municipal sewage systems, or as to whether a municipality, without express reservation, retains the right to veto a tie-in within a municipality with which it shares a fully integrated sewage system. We note that the 1979 agreement anticipates that additional development in Dighton may result in flow rates specified in the agreement being exceeded and provides that in such an event "the parties will jointly plan, finance and construct additional sewers, pumping stations, and all other necessary works to enable the sewage flows from Dighton to be conveyed to [Taunton's] sewage treatment facilities."

[3] [4] ***646** 3. *The civil rights relief.* Central to proof of a violation of G.L. c. 12, § 11I,[10] is the existence of a right secured by "the Constitution or laws of either the United States or of the Commonwealth." *Bally v. Northeastern Univ.*, 403 Mass. 713, 717, 532 N.E.2d 49 (1989). See also *Rosenfeld v. Board of Health of Chilmark*, 27 Mass.App.Ct. 621, 626, 541 N.E.2d 375 (1989). Hovnanian, in its complaint, alleges unlawful interference with its "constitutionally protected property rights" and unconstitutional deprivation of property without due process. In its reply brief, Hovnanian bases its claim upon "a fundamental constitutional right to ****1049** use its property lawfully," relying on recognized constitutional "guaranties [that] include the right to own land and to use and improve it according to the owner's conceptions of pleasure, comfort or profit...." *Brett v. Building Commr. of Brookline*, 250 Mass. 73, 77, 145 N.E. 269 (1924). At trial, however, Hovnanian focused its claims not upon an interference with any general right to use of its property, but upon the deprivation by the defendants of its claimed right to tie into the South Walker Street line and to the approval of its subdivision plan by the Taunton planning board. Contrast *Bell v. Mazza*, 394 Mass. 176, 474 N.E.2d 1111 (1985). That narrow focus fails to implicate any remedy provided under G.L. c. 12, § 11I.

10 General Laws c. 12, § 11I, inserted by St.1979, c. 801, § 1, provides in pertinent part:

> "Any person whose exercise or enjoyment of rights secured by the constitution or laws of the United States, or of rights secured by the constitution or laws of the commonwealth, has been interfered with, or attempted to be interfered with [by threats, intimidation or coercion]

> may institute ... a civil action for ... compensatory money damages."

As determined by the judge, and affirmed by us, Hovnanian did not have a statutory right to connect into the South Walker Street line. It also had no constitutional right to the favorable exercise of municipal discretion with respect to that tie-in. [11]

11 Even if, contrary to our belief, Hovnanian's interest in a sewer tie-in was related to a constitutionally secured right to use of the property in question, see *Bell v. Mazza, supra,* at 182, 474 N.E.2d 1111, remedial rights under G.L. c. 12, § 11I, nevertheless, may not be involved. The Supreme Judicial Court has concluded "that the Legislature intended to provide a remedy under G.L. c. 12, § 11I, coextensive with 42 U.S.C. § 1983 (Supp. V 1981)." *Id.* at 181, 474 N.E.2d 1111. *Redgrave v. Boston Symphony Orchestra, Inc.,* 399 Mass. 93, 98, 502 N.E.2d 1375 (1987). Not directly involved here is the recognized distinction "that the Federal statute requires State action whereas its State counterpart does not." *Batchelder v. Allied Stores Corp.,* 393 Mass. 819, 822–823, 473 N.E.2d 1128 (1985). We, therefore, are guided by decisions interpreting the Federal statute which have recognized that when broad discretion is accorded to a governmental body, as here, where both Taunton and Dighton have virtually unbounded discretion to permit the tie-in in question, the likelihood of the existence of a property interest in that tie-in is greatly diminished. *Rosenfeld v. Board of Health of Chilmark,* 27 Mass.App.Ct. at 627, 541 N.E.2d 375.

***647** Had Hovnanian asserted a specific property interest under State law, [12] any arbitrary misapplication of that law reflected by the denial of the tie-in nevertheless does not involve procedural or substantive due process rights. *Rosenfeld v. Board of Health of Chilmark, supra* 27 Mass.App.Ct. at 627–628, 541 N.E.2d 375. "[T]he ordinary state administrative proceeding involving land use or zoning does not present [a violation of a Federal constitutional right], regardless of how disappointed the license or privilege seeker may feel at being ... turned down." *Id.* at 628, 541 N.E.2d 375, quoting from *Creative Envts., Inc. v. Estabrook,* 680 F.2d 822, 832 n. 9 (1st Cir.1981), cert. denied, 459 U.S. 989, 103 S.Ct. 345, 74 L.Ed.2d 385 (1982). See Bobrowski, Handbook of Massachusetts Land Use & Planning Law § 2.6.1 at 77 (1993 & Supp.1994) ("The *Creative Environments* holding has led, in the First Circuit, to a long line of land use decisions rejecting the use of § 1983 actions." [13] Moreover, we are not involved here with corrupt or egregious conduct that so shocks the conscience as to give rise to a due process claim. See *Raskiewicz v. Town of New Boston,* 754 F.2d 38, 44 (1st Cir.), cert. denied, 474 U.S. 845, 106 S.Ct. 135, 88 L.Ed.2d 111 (1985). *Rosenfeld v. Board of Health of Chilmark, supra* 27 Mass.App.Ct. at 628, 541 N.E.2d 375.

12 Other than its claims under G.L. c. 83, § 3, and G.L. c. 41, §§ 81K to 81GG, Hovnanian does not assert violation of any right secured by any other laws of the Commonwealth. We, therefore, do not go beyond considering violation of constitutional rights. See *Bell v. Mazza,* 394 Mass. at 181 n. 7, 474 N.E.2d 1111.

13 This commentator notes that the First Circuit line of decisions is not followed in the other Federal circuits. See *Id.* § 2.6.1 at 77 n. 16.

[5] [6] ***648** Hovnanian's claim of a right to approval of its subdivision plan is similarly unavailing. This court held in *K. Hovnanian at Taunton, Inc. v. Planning Bd. of Taunton,* 32 Mass.App.Ct. at 485–486, 590 N.E.2d 1172, that the decision of the Taunton planning board to reject Hovnanian's subdivision plan was correct given the failure of the plan to comply with the board's regulations and the absence of approval by the Taunton board of health based upon the unavailability of a sewer tie-in. It is significant that with respect to the absence of the Taunton board of health approval, this court, in effect, indicated that administrative discretion was not involved. We concluded that "the planning board had no choice but to disapprove the plans...." *Id.* at 486, 590 N.E.2d 1172. In ****1050** any event, no "property" interest is involved in the approval of a subdivision plan. *Cote v. Seaman,* 625 F.2d 1, 2 (1st Cir.1980). *Rosenfeld v. Board of Health of Chilmark, supra* 27 Mass.App.Ct. at 627, 541 N.E.2d 375. The existence of such an interest is "a necessary prerequisite to a fourteenth amendment due process claim." *Cote v. Seaman, supra* at 2.

We find no merit in Hovnanian's claim of denial of the constitutional right of equal protection and in light of our decision there is no need to address other issues argued by the defendants relating to evidentiary matters, immunity,

standards for attorneys' fees and the definition of "person" under G.L. c. 12, §§ 11H & 11I.

4. *Conclusion.* Accordingly, the declaratory relief portion of the judgment is affirmed. [14] The portion of the judgment with respect to Hovnanian's civil rights claims against the city of Taunton and the mayor is reversed. [15] No action is necessary with respect to the appeals from the decisions relating ***649** to the posttrial motions of Hovnanian, Dighton, and the Taunton commissioner and assistant commissioner.

14 Since separate argument was not made to us, we intimate no opinion with respect to that part of the declaratory judgment stating that "Taunton's permission is necessary as a condition of Dighton's approval of Hovnanian's application for sewer connection and extension permits where the contemplated tie-in is to occur in Dighton," insofar as it might be construed as applying to development of the nine-acre Dighton portion of the land under option.

15 Accordingly, Hovnanian is not entitled to the award of attorneys' fees. See note 5, *supra; Flesner v. Technical Communications Corp.*, 410 Mass. 805, 819 n. 13, 575 N.E.2d 1107 (1991).

*So ordered.*

**All Citations**

37 Mass.App.Ct. 639, 642 N.E.2d 1044

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305 Ga.App. 734
Court of Appeals of Georgia.

PARRIS PROPERTIES, LLC et al.
v.
NICHOLS et al. (two cases).
Nichols et al.
v.
Parris Properties, LLC et al.

Nos. A10A1029, A10A1030, A10A1031
|
Aug. 30, 2010.
|
Certiorari Denied Feb. 7, 2011.

**Synopsis**

**Background:** Landowners of servient estate brought action against adjacent landowner, which held dominant estate of underground sewer-line easement, to prevent it from replacing existing sewer pipe with a larger one. Dominant estate owner counterclaimed for conversion based upon disposal by servient estate owners of its construction materials. Following a jury trial in which jury found that the larger diameter pipe would not constitute a substantial change in the easement, the Clarke Superior Court, Sweat, J., entered judgment prohibiting dominant estate owners from making any permanent changes to surface of servient estate owners' property in replacing the pipe, and holding servient estate owners liable for conversion. Both parties appealed.

**Holdings:** The Court of Appeals, McMurray, Senior Appellate Judge, held that:

[1] easement unambiguously authorized replacement of sewer line;

[2] replacement of four-inch cement sewer pipe with six- or eight-inch polyvinyl chloride (PVC) sewer pipe would not be unilateral alteration of physical boundaries of easement;

[3] issue of whether replacement would constitute substantial change in manner, frequency, and intensity of use of easement was for jury;

[4] dominant owner had implied right to place surface structures on servient estate as required by city ordinance;

[5] servient owners exercised dominion and control over dominant owner's pipe fixtures as required for conversion; and

[6] remand was required to determine whether dominant owner or servient estate owners were prevailing parties.

Affirmed in part, reversed in part, vacated in part, and remanded with directions.

**Procedural Posture(s):** On Appeal.

West Headnotes (28)

[1] **Appeal and Error** ⇐ Preverdict Motions; Direction of Verdict

**Appeal and Error** ⇐ Sufficiency of evidence

**Appeal and Error** ⇐ Postverdict Motions; Judgment Notwithstanding Verdict (Jnov)

**Appeal and Error** ⇐ Taking Case or Question from Jury; Judgment as a Matter of Law

**Appeal and Error** ⇐ Postverdict motions; judgment notwithstanding verdict (JNOV)

On appeal from the denial of a motion for a directed verdict or for judgment notwithstanding the verdict (JNOV), appellate courts construe the evidence in the light most favorable to the party opposing the motion, and the standard of review is whether there is any evidence to support the jury's verdict.

4 Cases that cite this headnote

[2] **Appeal and Error** ⇐ Easements

Construction, interpretation and legal effect of a contract such as an easement is an issue of law, which is subject to de novo review.

3 Cases that cite this headnote

[3] **Easements** ⇐ Maintenance and repair

"Maintenance" of sewer line included removal and replacement of a malfunctioning or

worn-out sewer pipeline, and, thus, easement which permitted construction, repair, and maintenance of sewer line unambiguously authorized replacement of cement sewer line which was more than 50 years old; sewer pipe was becoming increasingly brittle and crushed easily, rendering the entire sewer line in need of replacement with new polyvinyl chloride (PVC) pipe.

[4] **Easements** 🡐 By express grant or reservation

In construing the language of an express easement, courts apply the rules of contract construction.

3 Cases that cite this headnote

[5] **Contracts** 🡐 Intention of Parties

**Contracts** 🡐 Language of contract

Cardinal rule of contract construction is to ascertain the parties' intent, and where the contract terms are clear and unambiguous, the court will look to that alone to find the true intent of the parties.

4 Cases that cite this headnote

[6] **Contracts** 🡐 Ambiguity in general

Absent an ambiguity that cannot be resolved by the rules of construction, the interpretation of contractual terms is a question of law for the court.

4 Cases that cite this headnote

[7] **Easements** 🡐 Alteration

Replacement of four-inch cement sewer pipe with six- or eight-inch polyvinyl chloride (PVC) sewer pipe would not be unilateral alteration of physical boundaries of sewer line easement; easement did not specify exact dimensions of the land granted for running the sewer pipeline, and there was evidence that replacement would not expand the physical boundaries of the easement because six-inch replacement pipe would have same outer dimensions as old pipe, and eight-inch pipe would not occupy appreciably more space.

1 Case that cites this headnote

[8] **Easements** 🡐 Practical location by parties

Path of sewer line easement was defined and became fixed according to the original construction and placement of the pipeline.

[9] **Easements** 🡐 Change of location

**Easements** 🡐 Deviation from way

Once the path of sewer line easement became fixed, the path could not be unilaterally relocated or widened by either of the parties.

1 Case that cites this headnote

[10] **Easements** 🡐 Mode of use

**Easements** 🡐 Alteration

Change in the manner, frequency, and intensity of use of the easement within the physical boundaries of the existing easement is permitted without the consent of the other party, so long as the change is not so substantial as to cause unreasonable damage to the servient estate or unreasonably interfere with its enjoyment.

6 Cases that cite this headnote

[11] **Easements** 🡐 Extent of way

Physical boundaries of a sewer line easement are not limited to such space as was actually occupied by the specific pipe laid at the inception of the easement; rather, easement includes the general area occupied by the existing pipeline, that is, the basic trench path within which the existing pipe was placed.

[12] **Easements** 🡐 Trial

Issue of whether replacement of the sewer pipeline would constitute a substantial change in manner, frequency, and intensity of use of sewer line easement was for jury in action to prevent

dominant estate owner from replacing existing sewer pipe with a larger one.

4 Cases that cite this headnote

[13] **Easements** ⬅ Alteration

Dominant estate owner had implied right under sewer line easement to place surface structures on the servient estate as required by city ordinance; inability to do so would frustrate its express rights granted in the easement to repair and maintain the sewer pipeline.

[14] **Easements** ⬅ By express grant or reservation

Grant of an easement impliedly includes the authority to do those things which are reasonably necessary for the enjoyment of the things granted.

3 Cases that cite this headnote

[15] **Easements** ⬅ By express grant or reservation

**Property** ⬅ Acquisition, Transfer, and Disposition of Property in General

When one grants a thing, he is deemed also to grant that which is within his ownership without which the grant itself will be of no effect.

[16] **Easements** ⬅ By express grant or reservation

Grantees of an easement also have an implied right in the easement to take the action required of them to comply with government rules and regulations.

[17] **Appeal and Error** ⬅ Sufficiency and scope of motion

Grounds raised in a motion for judgment notwithstanding the verdict (JNOV) that were not raised in the motion for directed verdict will not be considered on appeal.

3 Cases that cite this headnote

[18] **Conversion and Civil Theft** ⬅ Assertion of ownership or control in general

**Conversion and Civil Theft** ⬅ Use or disposition of property

Servient estate owners exercised "dominion and control" over dominant estate owner's pipe fixtures as required for dominant owner's conversion claim by having them removed from their property and disposed of at a landfill, even if dominant estate owners acted wrongfully by depositing and storing them on servient owners' land; there was evidence that servient owners failed to exercise due care in removing them by having them dumped, with no consideration given as to their ultimate fate, and temporary restraining order designated that dominant owners were to remove them.

1 Case that cites this headnote

[19] **Conversion and Civil Theft** ⬅ In general; nature and elements

"Conversion" consists of an unauthorized assumption and exercise of the right of ownership over personal property belonging to another, in hostility to his rights, an act of dominion over the personal property of another inconsistent with his rights, or an unauthorized appropriation; thus, any distinct act of dominion and control wrongfully asserted over another's personal property, in denial of his right or inconsistent with his right, is a conversion of such property.

6 Cases that cite this headnote

[20] **Conversion and Civil Theft** ⬅ Use or disposition of property

Unauthorized removal and disposal of personal property can constitute "conversion."

1 Case that cites this headnote

[21] **Conversion and Civil Theft** ⬅ Assertion of ownership or control in general

Exercise of dominion and control over property in violation of a court order or judgment is "conversion."

5 Cases that cite this headnote

[22] **Conversion and Civil Theft** ⬅ Verdict and findings

Jury verdict in favor of dominant estate owner on conversion claim, which was based on servient estate owners dumping expensive pipe fixtures at landfill, was not inconsistent with verdict in favor of servient owners on nuisance claim, which was based upon dominant owner placing pipe fixtures and construction equipment on servient owners' land; jury could have predicated verdict on nuisance claim on items other than pipe fixtures.

1 Case that cites this headnote

[23] **Easements** ⬅ Pleading

**Judgment** ⬅ Relief awarded in general

Court did not err by declining to amend judgment to include the additional finding that the servient estate owner could not make any permanent changes to the surface of the sewer line easement until installation of the new sewer pipe by dominant estate owner; issue of servient owners' construction plans which would have resulted in changes to the surface were not included in the pre-trial order as matters for determination, and dominant estate owners had not previously requested any declaratory or injunctive relief pertaining to this issue prior to the entry of judgment. West's Ga.Code Ann. § 9–11–52(c).

[24] **Appeal and Error** ⬅ Briefs and argument in general

**Appeal and Error** ⬅ Citation to facts and legal authority in general

Appellant's enumeration of error which lacked legal argument or citation to authority in support was abandoned. Court of Appeals Rule 25(a)(3), (c)(2).

[25] **Judgment** ⬅ Nature and scope of remedy

**Trial** ⬅ Additional findings

Motion for the trial court to amend the judgment to make additional findings is not a procedural device for injecting new issues into the case. West's Ga.Code Ann. § 9–11–52(c).

[26] **Judgment** ⬅ Conformity to Pleadings and Proofs

Party cannot request and obtain relief where the propriety of that relief was never litigated and the opposing party was never given an opportunity to assert defenses to the relief. West's Ga.Code Ann. § 9–11–54(c)(1).

[27] **Appeal and Error** ⬅ Costs and fees

Remand was required to determine whether dominant estate owner or servient estate owners were prevailing parties and entitled to costs, where jury found in favor of dominant owners on some claims and in favor of servient owners on others. West's Ga.Code Ann. § 9–11–54(d).

[28] **Costs, Fees, and Sanctions** ⬅ Result of Litigation; Prevailing Party

Trial court is afforded discretion in assessing costs because sometimes it is not so clear who the prevailing party is, as one party may win on some issues and claims and the other on other issues and claims. West's Ga.Code Ann. § 9–11–54(d).

**Attorneys and Law Firms**

****851** Kenneth B. Hodges III, Albany, Simon Weinstein, Ken Parris, for appellants.

Gibson, Deal, Fletcher & Durham, James B. Deal, Michael R. Dunham, Norcross, for appellees.

**Opinion**

McMURRAY, Senior Appellate Judge.

***734** Kathy and Dennis Nichols own property that is burdened by an underground sewer line easement that benefits the adjacent property owned by Parris Properties, LLC. The Nicholses brought this action against Parris Properties and its principal, Kenneth Parris (collectively, the "Parris Defendants"), to prevent the Parris Defendants from replacing the existing sewer pipe with a larger one. The Parris Defendants answered and counterclaimed for conversion based upon the Nicholses' disposal of certain construction materials owned by Parris Properties.

The case was tried before a jury which found, among other things, that replacement of the existing sewer pipeline with a larger diameter pipe would not constitute a substantial change in the easement, and that the Nicholses were liable for conversion. The trial court subsequently entered its "Final Judgment, Declaratory ***735** Judgment, and Order on Permanent Injunction" that included a provision prohibiting the Parris Defendants from making any permanent changes to the surface of the Nicholses' property in replacing the sewer pipe. The trial court also declined to award costs to the Parris Defendants. The Parris Defendants then filed a motion requesting that the trial court amend the final judgment to remove the provision prohibiting surface alteration and to make additional findings related to the easement, which the trial court denied.

In Case No. A10A1031, the Nicholses contend that the trial court erred by denying their motions for a directed verdict and for judgment notwithstanding the verdict ("j.n.o.v.") pertaining to the scope of the easement and the Parris Defendants' counterclaim for conversion. In Case Nos. A10A1029 and A10A1030, the Parris Defendants contend that the trial court erred by including the provision prohibiting surface alteration in the judgment, and erred by declining to amend the judgment or award them court costs as the prevailing parties.

For the reasons discussed below, we affirm the trial court's denial of the Nicholses' motions for a directed verdict and for j.n.o.v.; reverse the judgment to the extent it prohibits surface alteration; reverse in part the trial court's denial of the Parris Defendants' motion to amend the judgment; vacate the trial court's order declining to award costs to the Parris Defendants; and remand for further action consistent with this opinion.

*Case No. A10A1031*

[1] [2] 1. The Nicholses contend that the trial court erred in denying their motions for a directed verdict and for j.n.o.v. pertaining to whether enlargement of the sewer pipe fell within the scope of the easement. On appeal from the denial of a motion for a directed ****852** verdict or for j.n.o.v., we construe the evidence in the light most favorable to the party opposing the motion, and the standard of review is whether there is any evidence to support the jury's verdict. See *McClung v. Atlanta Real Estate Acquisitions, LLC*, 282 Ga.App. 759, 759–760, 639 S.E.2d 331 (2006). However, "[t]he construction, interpretation and legal effect of a contract such as an easement is an issue of law," which is subject to de novo review. (Footnote omitted.) *Savannah Jaycees Foundation v. Gottlieb*, 273 Ga.App. 374, 376(1), 615 S.E.2d 226 (2005). See *Reynolds Properties v. Bickelmann*, 300 Ga.App. 484, 487, 685 S.E.2d 450 (2009). Guided by these principles, we turn to the record in the present case.

*The Sewer Line Easement.* At the heart of these companion appeals is an express easement originally executed and recorded in 1952 by C.L. Bradford, as grantor, and William R. Bentley, as ***736** grantee. It is undisputed that the Nicholses are the successors in title to Bradford, and that Parris Properties is the successor in title to Bentley.

The easement provides in relevant part:

> That the said C.L. Bradford does give, grant and convey to William R. Bentley a permanent easement for the construction of a sewer from the property of William R. Bentley to the trunk sewer on Vermont Road. The said sewer is to be constructed along the Southeastern line of the said C.L. Bradford and is to run along the hedge of said Southeastern line of C.L. Bradford one hundred and forty[-]seven and six-tenths (147.6) feet from the property of the said William R. Bentley to Vermont Road.
>
> The said William R. Bentley agrees that he will bear the total cost of the construction of the said sewer and any cost of the maintenance and repair of the same, for which he binds himself, his heirs and assigns, and that the said sewer will be placed beneath the surface of the said property of C.L. Bradford, and that the said William R. Bentley will fill in and restore the property of the said C.L. Bradford

to its present condition and will do no damage to the said property of the said C.L. Bradford.

The property burdened by the sewer line easement has a single family residence on it and is part of a neighborhood listed on the National Register of Historic Homes. The Nicholses acquired the property and currently live in the residence.

The property that benefits from the sewer line easement is adjacent to the Nicholses' property and has three rental homes located on it. The property has dual zoning; the front portion of the property is zoned multifamily, and the rear portion is zoned single family. Parris Properties acquired the property and wishes to develop it by building a number of townhomes.

*Installation of the Sewer Pipeline.* At or about the time the easement was granted in 1952, a sewer pipe was placed in the ground of what is now the Nicholses' property. It was a concrete pipe with an inside diameter of four inches and an outside diameter of six inches. At the time the sewer pipe was placed in the ground, the City of Atlanta did not require that the pipeline have any surface structures installed as part of the line, and so the pipeline could be located wholly beneath the surface of the property.

A four-inch sewer pipe is typical of a service connection for a *737 single family residence.[1] In contrast, the City of Atlanta generally requires an eight-inch sewer pipe for multifamily residential units, such as townhomes, although in some circumstances a six-inch sewer pipe may be permitted. The City of Atlanta now requires installation of a manhole to provide access to eight-inch sewer pipes and installation of a cleanout to provide access to six-inch sewer pipes. As explained by the Director of Watershed Management for the City of Atlanta, a cleanout is "a place where you can insert what plumbers call a snake into the line, which is a long wire or a cable[ ] ... that can turn and push and cut things that might plug up the pipe." Manholes and cleanouts run from the pipeline to the surface and are "visible from the ground."

1 Unless otherwise noted, references to the diameter of a pipe are to its inside diameter.

**853 *The Proposed Replacement of the Sewer Pipeline.* In 2005, the Nicholses began a project for the renovation and expansion of their home, and a subcontractor working on the project damaged a segment of the existing four-inch concrete sewer pipe. The Nicholses replaced the segment with PVC pipe of the same size. As required by the City of Atlanta, the Nicholses had a cleanout installed on the surface of their property as part of the repair work.

That same year, Parris Properties hired a structural engineer to devise plans for replacing the entire existing sewer pipeline with either a six-inch or eight-inch PVC pipe in order to accommodate the multifamily residential units that Parris Properties wanted to construct on its property. Pursuant to City of Atlanta requirements, replacement with a six-inch pipe would necessitate the installation of a cleanout with a six-inch diameter on the Nicholses' property; replacement with an eight-inch pipe would necessitate the installation of a manhole on their property.

Parris Properties sought and obtained building permits from the City of Atlanta to replace the existing sewer pipeline with an eight-inch pipe. Before the replacement project began, however, the Nicholses filed the present action against the Parris Defendants to prevent the project from happening.[2]

2 The City of Atlanta also was a named defendant in the original lawsuit, but the trial court granted the City's motion to dismiss. That ruling has not been appealed, and the City is not a party to any of these companion appeals.

A jury trial ensued in which the central issue was whether increasing the size of the sewer pipeline to a six-inch or eight-inch pipe would constitute a substantial change in the easement requiring the Nicholses' consent. The Nicholses moved for a directed verdict on the ground that replacement with a larger diameter pipe was beyond the scope of the easement as a matter of law, which the trial court denied. The jury thereafter found that replacement of the sewer *738 pipeline with either a six-inch or eight-inch pipe would not constitute a substantial change. The Nicholses moved for j.n.o.v., which the trial court denied.

[3] (a) The Nicholses contend that they were entitled to judgment as a matter of law because the unambiguous language of the easement does not authorize Parris Properties to replace a functioning sewer pipeline. The Nicholses emphasize that the easement provides for the "construction," "repair," and "maintenance" of the sewer line easement, words they contend do not encompass the "replacement" of the existing sewer pipeline, which they maintain is functioning properly. We are unpersuaded.

[4] [5] [6] In construing the language of an express easement, we apply the rules of contract construction. See *Municipal Elec. Auth. of Ga. v. Gold–Arrow Farms, Inc.*, 276 Ga.App. 862, 866(1), 625 S.E.2d 57 (2005). The cardinal rule of contract construction is to ascertain the parties' intent, and "[w]here the contract terms are clear and unambiguous, the court will look to that alone to find the true intent of the parties." (Citation and punctuation omitted.) Id. Absent an ambiguity that cannot be resolved by the rules of construction, the interpretation of contractual terms is a question of law for the court. Id.

Applying these principles to the construction of the easement at issue, we conclude that the easement unambiguously authorizes the removal and replacement of a malfunctioning or worn-out sewer pipeline. The right to remove and replace such a sewer pipe falls within the ambit of "repair" and "maintenance." "The common definition of 'repair' is very broad in scope and includes in its meaning 'to make good' " by replacing a structure in poor condition. (Citation and punctuation omitted.) *Carpet Central v. Johnson*, 222 Ga.App. 26, 27(1), 473 S.E.2d 569 (1996) (physical precedent only). See also Merriam–Webster's Online Dictionary, http://www.merriam-webster. com/dictionary/repair ("repair" means "to restore by replacing a part or putting together what is torn or broken," "to restore to a sound or healthy state," or "to make good" or "remedy"). Furthermore, to "maintain" equipment means to "preserve [it] from failure or decline," see Merriam–Webster's Online Dictionary, ****854** http://www.merriam-webster.com/dictionary/maintain, and a sewer cannot be properly maintained if the pipe cannot be replaced when it no longer functions properly or wears out.

The Parris Defendants presented evidence that the existing sewer pipe, which is over a half century old, is in such a condition. According to a plumbing contractor who had previously worked on the sewer pipe, the existing concrete pipe is becoming increasingly brittle and crushes easily, rendering the entire sewer line in need of replacement with new PVC pipe. A former City of Atlanta sewer ***739** engineer also testified that the existing sewer line, as modified by the repairs made by the Nicholses in 2005, is graded improperly and is virtually guaranteed to create future problems with sewage clogging and backing up in the line. Kenneth Parris further testified that the existing sewer pipe has an issue with "slow draining" in a shower, sink, and tub of one of the rental homes on the property owned by Parris Properties. Because there was some evidence that the existing sewer pipe is not functioning properly and is worn out, and because the terms of the easement permit replacement of a pipe in that condition, the trial court properly denied the Nicholses' motions for a directed verdict and for j.n.o.v. on the asserted ground.

[7] (b) The Nicholses next contend that they were entitled to judgment as a matter of law because enlarging the dimensions of the sewer pipe would impermissibly expand the scope of the easement. According to the Nicholses, a six-inch or eight-inch pipe would occupy more land than the existing sewer pipeline and thus would constitute a unilateral alteration in the physical boundaries of the easement if installed by Parris Properties. We disagree.

[8] [9] [10] The easement in the present case does not specify the exact dimensions of the land granted for running the sewer pipeline. Hence, under Georgia law the path of the easement was defined and became fixed according to the original construction and placement of the pipeline. See *Sloan v. Sarah Rhodes, LLC*, 274 Ga. 879, 880, 560 S.E.2d 653 (2002) ( "[W]here the parties have established the actual location and dimensions of an easement, that determination is the controlling factor under Georgia law."). Once the path of the easement became fixed, the path could not be unilaterally relocated or widened by either of the parties. See id. at 879–880, 560 S.E.2d 653; *Herren v. Pettengill*, 273 Ga. 122, 123–124(2), 538 S.E.2d 735 (2000); *Thomason v. Kern & Co.*, 259 Ga. 119, 120, 376 S.E.2d 872 (1989); *Martin v. Seaboard Air Line R.*, 139 Ga. 807, 809(1), 77 S.E. 1060 (1913); *Jackson Elec. Membership Corp. v. Echols*, 84 Ga.App. 610, 611–612, 66 S.E.2d 770 (1951). In contrast, a change in "the manner, frequency, and intensity of use" of the easement *within the physical boundaries of the existing easement* is permitted without the consent of the other party, so long as the change is not so substantial as to "cause unreasonable damage to the servient estate or unreasonably interfere with its enjoyment." (Punctuation omitted.) *Municipal Elec. Auth. of Ga.*, 276 Ga.App. at 869(2), 625 S.E.2d 57, quoting Restatement (Third) of Property: Servitudes § 4.10 cmt. f. See also *Faulkner v. Ga. Power Co.*, 243 Ga. 649, 649–650, 256 S.E.2d 339 (1979); *Humphries v. Ga. Power Co.*, 224 Ga. 128, 129–130(3), 160 S.E.2d 351 (1968); *Kerlin v. Southern Bell Tel., etc. Co.* 191 Ga. 663, 667–668(2), 13 S.E.2d 790 (1941).

***740** Here, there was evidence that the removal of the existing sewer pipe and replacement with either a six-inch or eight-inch PVC pipe would not expand the physical

boundaries of the easement. As to a new six-inch PVC pipe, there was testimony at trial that PVC pipe is thinner than concrete pipe, such that the old concrete pipe with a four-inch inner diameter and a new PVC pipe with a six-inch inner diameter would actually have the same *outer* diameter. A new six-inch PVC pipe thus would occupy the equivalent amount of land as the existing pipe.

[11] As to a new eight-inch PVC pipe, it is true that the pipe itself would occupy a greater amount of space than the existing pipe, although not appreciably so. But the physical boundaries of a sewer line easement are not "limited to such space as was actually occupied by [the] specific [pipe]" laid at the inception of the easement. **855 *Kerlin,* 191 Ga. at 667(2), 13 S.E.2d 790 (utility easement not "limited to such space as was actually occupied by [the] specific poles and wires" originally installed). See also *Humphries,* 224 Ga. at 129–130(3), 160 S.E.2d 351. Rather, the easement includes the general area occupied by the existing pipeline, that is, the basic trench path within which the existing pipe was placed. [3] See *Reid v. Washington Gas Light Co.,* 232 Md. 545, 194 A.2d 636, 639 (1963) (replacement of existing pipe with larger one along same trench path did not constitute a relocation or alteration of the boundaries of the easement); *Knox v. Pioneer Natural Gas Co.,* 321 S.W.2d 596, 601 (Tex.Civ.App.1959); 61 AmJur 2d Pipelines § 36 ("Replacement of a small gas line with a larger one, using the same trench, is permitted where the increased capacity of the line results in no decrease in safety to the landowner and no substantial increase in the burden of the servient estate."). [4]

3 Our holding in this case is not inconsistent with *Nodvin v. Plantation Pipe Line Co.,* 204 Ga.App. 606, 612(4), 420 S.E.2d 322 (1992), abrogated in part on other grounds, *Yaali, Ltd. v. Barnes & Noble,* 269 Ga. 695, 696(2), 506 S.E.2d 116 (1998). In *Nodvin,* we rejected the contention that the pipeline easement was void for being vague and indefinite, noting that the location and size of a pipeline becomes certain once the pipe is placed in the ground and used with the acquiescence of both the grantor and grantee. *Nodvin,* 204 Ga.App. at 612(4), 420 S.E.2d 322. *Nodvin* addressed the validity of the easement in the first instance, not whether the subsequent replacement of the existing pipeline with a larger one would impermissibly expand the physical boundaries of the easement.

4 We have similarly held that with respect to overhead transmission lines, the stringing of new wires within the general area marked by the original poles, wires, and appurtenances was a "change in degree only, and not in kind," and thus was "a reasonable and normal incident of the existing [easement] right." *Kerlin,* 191 Ga. at 668(3), 13 S.E.2d 790. See also *Faulkner,* 243 Ga. at 649–650, 256 S.E.2d 339 (installation of new, higher voltage transmission wire in same easement right of way did not exceed the scope of the existing easement); *Humphries,* 224 Ga. at 129–130(3), 160 S.E.2d 351 (power company authorized to enter right-of-way and replace existing transmission poles and wires with new, larger equipment to accommodate higher voltages); *Municipal Elec. Auth. of Ga.,* 276 Ga.App. at 869(2), 625 S.E.2d 57 (addition of fiber optic line to existing electronic transmission system of towers and poles was a change in the degree of use rather than the kind of use, and thus fell within the scope of the original utility easement).

*741 The Nicholses do not contend that Parris Properties intends to relocate the trench path in removing and replacing the existing sewer pipeline. Furthermore, Parris Properties' structural engineer testified that the eight-inch sewer pipeline would "go straight within the same alignment of where the existing sewer line was." And the "Sewer Extension Drawings" developed by the structural engineer, which included diagrams of how the existing sewer pipeline would be replaced, also constituted some evidence that the new pipe would be installed along the same basic trench path as the existing pipeline. Accordingly, even though an eight-inch PVC pipe has a slightly larger outer diameter than the existing sewer pipe, there was evidence that the new pipe would "not encroach upon any space which is beyond or without" the same "general area" now being occupied by the sewer line easement, and thus is "permissible as territorially within the easement." *Kerlin,* 191 Ga. at 667–668(2), 13 S.E.2d 790.

Under these circumstances, there was evidence reflecting that the removal of the existing sewer pipe and replacement with either a six-inch or eight-inch PVC pipe would not expand the physical boundaries of the easement, and so the Nicholses were not entitled to judgment as a matter of law on that issue. Rather, the replacement with the new pipe would constitute a change in the manner, frequency, and intensity of use of the easement, meaning that Parris Properties could unilaterally make the replacement as long as the change would not be so substantial as to cause unreasonable damage to the

servient estate or unreasonably interfere with its enjoyment. See *Municipal Elec. Auth. of Ga.*, 276 Ga.App. at 869(2), 625 S.E.2d 57.

[12] (c) The Nicholses further contend that they were entitled to judgment as a matter of law because the uncontroverted evidence showed that increasing the size of the sewer pipeline would constitute a substantial change in the manner, frequency, and intensity of use of the easement. We do ****856** not agree because there was conflicting evidence over whether replacement of the sewer pipeline would constitute a substantial change, creating a jury question on the issue.

While there was testimony from the Director of Watershed Management for the City of Atlanta that a new sewer pipe with a six-inch or eight-inch diameter would increase the amount of wastewater flowing through the sewer pipeline, he also testified that a pipe of larger diameter is much less likely to get clogged than a smaller diameter pipe. There was testimony, moreover, that a new larger pipe would be more durable than the old one because it would be made of PVC rather than concrete. Additionally, Mr. Nichols testified that the sewer pipeline for his home does not tie into the sewer pipeline occupying the easement, and so any clog or problem in the latter pipeline would not affect the operation of his own sewer or risk any damage to his home.

***742** In light of this testimony, there was evidence from which the jury could find that increasing the size of the sewer pipe would not cause unreasonable damage to the Nicholses' property or unreasonably interfere with its enjoyment. See generally *Faulkner*, 243 Ga. at 649–650, 256 S.E.2d 339; *Humphries*, 224 Ga. at 129–130(3), 160 S.E.2d 351; *Kerlin*, 191 Ga. at 667–668(2), 13 S.E.2d 790; *Municipal Elec. Auth. of Ga.*, 276 Ga.App. at 869(2), 625 S.E.2d 57; Restatement (Third) of Property: Servitudes § 4.10 cmt. f. The issue of whether the replacement of the sewer pipe would constitute a substantial change in the easement, therefore, was properly submitted to the jury.

[13] (d) Lastly, the Nicholses contend that they were entitled to judgment as a matter of law because replacement of the existing sewer pipe requires installation of surface structures (a manhole or cleanout) which they contend are not authorized or contemplated by the easement. They point out that the easement states that the sewer pipeline will be placed "beneath the surface" and that the surface of the land will be "restore[d] ... to its present condition." Consequently, the Nicholses argue that the easement does not permit Parris Properties to make any permanent alterations to the surface of their property as part of the installation of a new pipeline. Again, we disagree.

The evidence at trial reflected that unlike when the easement was first created, the City of Atlanta currently requires installation of a cleanout to provide access to a six-inch sewer pipe and of a manhole to provide access to an eight-inch sewer pipe for repair and maintenance of the pipeline. Indeed, it is undisputed that replacement of the existing four-inch sewer pipe with a pipe of the same inner diameter likewise would require installation of a cleanout. Moreover, even when an old pipeline is not replaced in its entirety, a cleanout must be installed when a portion of the pipe is repaired or replaced near the City of Atlanta's right-of-way.

[14] [15] [16] This evidence shows that Parris Properties cannot exercise its rights under the easement to repair and maintain the sewer pipeline by replacing a malfunctioning or worn-out pipe if it cannot install any surface structures on the Nicholses' property. "The grant of an easement impliedly includes the authority to do those things which are reasonably necessary for the enjoyment of the things granted." *Jakobsen v. Colonial Pipeline Co.*, 260 Ga. 565, 566(2), 397 S.E.2d 435 (1990) (pipeline easement included implied right to side-cut timber encroaching upon the right-of-way so that an inspection of the pipeline could be made). See also *Avery v. Colonial Pipeline Co.*, 213 Ga.App. 388, 389–390(1), 444 S.E.2d 363 (1994). Moreover, "[w]hen one grants a thing, he is deemed also to grant that within his ownership without which the grant itself will be of no effect." (Citation and punctuation omitted.) ***743** *Roberts v. Roberts*, 206 Ga.App. 423, 424(2), 425 S.E.2d 414 (1992). See also *Massey v. Britt*, 224 Ga. 762, 164 S.E.2d 721 (1968). Grantees of an easement also have an implied right in the easement to take the action required of them to comply with government rules and regulations. See *Avery*, 213 Ga.App. at 390(1), 444 S.E.2d 363 (pipeline easement included implied right to remove trees and vegetation from the right-of-way in order to comply with federal safety regulations). In light of these principles, Parris Properties has an implied right under ****857** the easement to place surface structures on the Nicholses' property where, as here, the inability to do so would frustrate its express rights granted in the easement to repair and maintain the sewer pipeline.

For the combined reasons set forth in subdivisions (a)–(d), the trial court properly denied the Nicholses' motions

for a directed verdict and for j.n.o.v. regarding whether enlargement of the existing sewer pipe fell within the scope of the easement. Parris Properties is authorized to remove the existing sewer pipeline and replace it with a six-inch or eight-inch PVC pipe along the same basic trench path, and to install a manhole or cleanouts on the surface of the Nicholses' property to the extent required by the City of Atlanta.

[17] 2. The Nicholses also contend that the trial court erred in denying their motions for a directed verdict and for j.n.o.v. on the Parris Defendants' counterclaim for conversion predicated on the Nicholses' disposal of pipe fixtures owned by Parris Properties. According to the Nicholses, they never attempted to assert dominion over the pipe fixtures and never interfered with Parris Properties' ability to remove the materials. [5] In addition, the Nicholses maintain that they were entitled to remove the pipe fixtures because Parris Properties had no right to deposit the fixtures on their property in the first instance. Finally, the Nicholses assert that the jury's verdicts on their claim for nuisance and the Parris Defendants' counterclaim for conversion were inconsistent.

5 The Nicholses further argue that they were entitled to judgment as a matter of law because they disclaimed title and tendered the pipe fixtures to Parris Properties so as to discharge and release them from a conversion claim under OCGA § 44–12–153. While the Nicholses raised this argument in their motion for j.n.o.v., they did not raise it in their motion for a directed verdict. "[G]rounds raised in a motion for judgment notwithstanding the verdict that were not raised in the motion for directed verdict will not be considered on appeal." (Citation omitted.) *Southern Land Title, Inc. v. North Ga. Title,* 270 Ga.App. 4, 7(2), 606 S.E.2d 43 (2004). See also *Fertility Technology Resources v. Lifetek Med., Inc.,* 282 Ga.App. 148, 153(2), 637 S.E.2d 844 (2006).

Construed in favor of the jury's verdict, the relevant facts pertaining to the conversion counterclaim are as follows. This case was originally filed by the Nicholses in the Superior Court of Fulton County but was transferred to the Superior Court of Clarke County. In an order entered on March 10, 2006, the Superior Court of Fulton *744 County recited that Parris Properties had agreed "to refrain from any construction" until the transfer had been completed and the case had been assigned to a new judge.

On or about April 28, 2006, before the transfer of the case had been effectuated, Parris Properties deposited construction equipment and materials, including pipe fixtures for constructing a manhole, on the Nicholses' property. Thereafter, on May 4, 2006, in the order formally transferring the case to the Superior Court of Clarke County, the Superior Court of Fulton County directed all parties "to refrain from commencing to build, construct, or renovate anything on the property that is subject to the alleged easement."

On May 9, 2006, following the transfer and reassignment of the case, the Superior Court of Clarke County entered a temporary restraining order ("TRO") providing that the construction equipment and materials were to be removed from the Nicholses' property by Parris Properties, but did not specify a time frame within which the items had to be removed. Some of the items were removed from the property by Parris Properties, but not the pipe fixtures, which were the subject of negotiations between the parties concerning the time frame for removal. Subsequently, on June 6, 2006, after receiving proposed orders for interlocutory relief from both parties, the trial court entered its order on interlocutory injunction in which the Parris Defendants were "ordered to remove any equipment or materials placed on the Nichol[ses'] property within ten days of the date of this order, if not already removed."

It later became clear, however, that in the interim between entry of the TRO and the order on interlocutory injunction, the Nicholses had made the unilateral decision to have a contractor remove the pipe fixtures from their property and dump them at a **858 landfill. According to Mr. Parris, the pipe fixtures were worth over $4,000.

In the ensuing litigation, the Nicholses sought damages for nuisance based upon the depositing of the construction equipment and materials on their property, and the Parris Defendants sought damages for conversion based upon the Nicholses' removal and disposal of the pipe fixtures. The jury found in favor of the Nicholses on their nuisance claim and in favor of the Parris Defendants on their conversion counterclaim.

[18] [19] [20] [21] We conclude that the evidence adduced at trial was sufficient to support the Parris Defendants' counterclaim for conversion against the Nicholses.

> [C]onversion consists of an unauthorized assumption and exercise of the right of ownership over personal property belonging to another, in hostility to his rights; an act of dominion over the personal property of another inconsistent *745 with his rights; or an unauthorized appropriation. Thus, any distinct act of dominion and control wrongfully asserted over another's personal property, in denial of his right or inconsistent with his right, is a conversion of such property.

(Citations, punctuation and footnotes omitted.) *Williams v. Nat. Auto Sales*, 287 Ga.App. 283, 285(1), 651 S.E.2d 194 (2007). See OCGA § 51–10–1. The unauthorized removal and disposal of personal property can constitute conversion. See *Washington v. Harrison*, 299 Ga.App. 335, 339(1), 682 S.E.2d 679 (2009) (unauthorized removal of personal property from land by salvage crew at behest of landlord "with no consideration given as to its ultimate fate," and in violation of dispossessory statute, constituted conversion); *Thakkar v. St. Ives Country Club*, 250 Ga.App. 893, 896(5), 553 S.E.2d 181 (2001) (conversion could be found based upon unauthorized removal of trees from land and placement in "trash heap"). Furthermore, the exercise of dominion and control over property in violation of a court order or judgment constitutes conversion. See *Blevins v. Brown*, 267 Ga.App. 665, 668(2), 600 S.E.2d 739 (2004) (former husband's exercise of dominion and control over truck that had been awarded to former wife in divorce action constituted conversion).

The Nicholses exercised dominion and control over the pipe fixtures by having them removed from their property and disposed of at the landfill. And while a landowner may have the common law right to remove the personal property of others left on his land without his consent, the landowner still must use due care in removing the property. See *Reinertsen v. Porter*, 242 Ga. 624, 628(1), 250 S.E.2d 475 (1978); *Grier v. Ward*, 23 Ga. 145 (1857). Here, even if Parris Properties acted wrongfully by depositing and storing the pipe fixtures on the Nicholses' property,[6] there was evidence that the Nicholses failed to exercise due care in removing the expensive fixtures by having them dumped at a landfill "with no consideration given as to [their] ultimate fate." *Washington*, 299 Ga.App. at 339(1), 682 S.E.2d 679. Furthermore, this case is unique because the method for the removal of the pipe fixtures from the Nicholses' property was designated by court order: Parris Properties was to remove the fixtures under the terms of the TRO. Nevertheless, the Nicholses chose to exercise self-help and remove and dispose of the pipe *746 fixtures themselves when Parris Properties did not remove the fixtures as quickly as the Nicholses desired, and while the issue of the time frame for removal was still pending before the trial court for resolution. Under these circumstances, the jury was entitled to find that the Nicholses converted the pipe fixtures through their unauthorized removal and destruction of the fixtures in violation of a court order. See, e.g., *Washington*, 299 Ga.App. at 339(1), 682 S.E.2d 679; *Blevins*, 267 Ga.App. at 668(2), 600 S.E.2d 739; *Thakkar*, 250 Ga.App. at 896(5), 553 S.E.2d 181.

6 We need not resolve where or to what extent Parris Properties was entitled to deposit and store the construction equipment and materials on the Nicholses' property as part of its right to repair and maintain the sewer pipeline. Nor must we resolve whether Parris Properties violated the March 10, 2006 order by depositing and storing the items on the property.

[22] Nor was the jury's verdict on the conversion counterclaim inconsistent with the verdict in favor of the Nicholses on their nuisance claim. As previously noted, there **859 was construction equipment and materials deposited on the Nicholses' property other than the pipe fixtures, and those other items were not removed and dumped at the landfill. The jury could have predicated its verdict on the nuisance claim on those other items and its verdict on the conversion counterclaim on the pipe fixtures, and, therefore, the verdicts on the two claims were not inconsistent.[7]

7 The Parris Defendants do not challenge the jury's verdict on the Nicholses' nuisance claim.

*Case Nos. A10A1029 and A10A1030*

3. The Parris Defendants contend that the trial court erred by including a provision in the judgment that prohibited them from making any permanent alterations to the surface of the Nicholses' property as part of the installation of a new sewer pipe. The Parris Defendants further contend that

the trial court erred by denying their motion to amend the judgment to allow for the installation of surface structures, such as a manhole or cleanouts, on the Nicholses' property. We agree. For the reasons discussed supra in Division 1(d), the Parris Defendants are entitled to alter the surface of the Nicholses' property by installing a manhole or cleanouts to the extent required by the City of Atlanta. Accordingly, the trial court's judgment is reversed to the extent it prohibits surface alteration, and the case is remanded for reentry of a judgment consistent with this opinion.

[23] [24] 4. The Parris Defendants contend that the trial court erred in declining to amend the judgment to include the additional finding that the Nicholses could not make any permanent changes to the surface of the easement until installation of the new sewer pipe.[8] In moving to amend the judgment pursuant to OCGA § 9–11–52(c), the *747 Parris Defendants claimed that the Nicholses planned to construct a new concrete driveway and a retaining wall over portions of the sewer line easement as part of the renovation and remodeling of their home, and that these changes to the surface of the easement would materially interfere with the installation of the new sewer pipe. They requested that the Nicholses not be permitted to proceed with any such construction "for six months from the date of a ruling on this [m]otion to [a]mend, or six months from the date an appellate court rules on this case, if an appeal is filed."

8 The Parris Defendants also enumerate as error the trial court's denial of their motion to amend the judgment to include an additional finding that the City of Atlanta is authorized to issue new building permits for the replacement of the existing sewer pipeline. However, they provide no legal argument or citation to authority in support of this enumeration, as required by Court of Appeals Rule 25(a)(3). The enumeration of error, therefore, is deemed abandoned. See Court of Appeals Rule 25(c)(2).

[25] [26] The issue of the Nicholses' planned construction and any potential claims related thereto were not included in the pre-trial order as matters for determination, and the Parris Defendants had not previously requested any declaratory or injunctive relief pertaining to this issue prior to the entry of judgment. A motion for the trial court to amend the judgment to make additional findings under OCGA § 9–11–52(c) is not a procedural device for injecting new issues into the case. See *Trustreet Properties v. Burdick,* 287 Ga.App. 565, 568, 652 S.E.2d 197 (2007) (motion to amend judgment properly denied where party sought to inject into the case a new methodology for calculation of damages to replace the one used at trial). Moreover, a party cannot request and obtain relief where the propriety of that relief was never litigated and the opposing party was never given an opportunity to assert defenses to the relief. See OCGA § 9–11–54(c)(1); *Church v. Darch,* 268 Ga. 237, 238(2), 486 S.E.2d 344 (1997). The trial court thus did not err in declining to amend the judgment in the manner requested by the Parris Defendants.

[27] [28] 5. Lastly, the Parris Defendants contend that the trial court erred in failing to award court costs to them as the prevailing parties. Under OCGA § 9–11–54(d), "costs shall be allowed as a matter of course to the prevailing party unless the court otherwise directs." The trial court is afforded discretion in assessing costs because "[s]ometimes it is not so clear who the prevailing **860 party is, as one party may win on some issues and claims and the other on other issues and claims." (Citation and punctuation omitted.) *Dacosta v. Allstate Ins. Co.,* 199 Ga.App. 292, 294(2), 404 S.E.2d 627 (1991).

In the present case, the jury found in favor of the Nicholses on their claim for nuisance, but not on their additional claims for trespass and punitive damages. The jury found in favor of the Parris Defendants on the issue of whether replacement with a six-inch or eight-inch pipe would constitute a substantial change and on their *748 counterclaim for conversion, but not on their additional counterclaims for trespass and punitive damages.

As discussed supra in Division 3, the trial court erred by including a provision in the judgment prohibiting the Parris Defendants from making any permanent alterations to the surface of the Nicholses' property as part of the installation of a new sewer pipe. The trial court's erroneous ruling on that issue may have affected its assessment of whether the Parris Defendants should be treated as the prevailing parties. Consequently, without expressing any opinion on the issue, we vacate the trial court's order declining to award costs and remand for reconsideration in light of this opinion.

*Judgment affirmed in part, reversed in part, and vacated in part, and case remanded with direction in Case Nos. A10A1029 and A10A1030. Judgment affirmed in Case No. A10A1031.*

BARNES, P.J., and Senior Appellate Judge G. ALAN BLACKBURN concur.

**All Citations**

305 Ga.App. 734, 700 S.E.2d 848, 10 FCDR 2886

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243 Ga. 80
Supreme Court of Georgia.

DeKALB COUNTY et al.
v.
TOWNSEND ASSOCIATES, INC.

No. 34311.
|
Argued Jan. 10, 1979.
|
Decided Feb. 6, 1979.

**Synopsis**
Property owner sued county, its commissioners and other officers seeking injunction, mandamus and declaratory judgment based on assurances that sewer services would be available to residential subdivision. The DeKalb Superior Court, Broome, J., declared moratorium ordinance unconstitutional, enjoined its enforcement and issued a mandamus absolute, and appeal was taken. The Supreme Court, Undercofler, P. J., held that: (1) there was no evidence of reasonable necessity for moratorium on sewer tap-ins; (2) it was immaterial that plaintiff produced no evidence that a written agreement existed between itself and the county for sewer services; (3) hearsay rule did not prevent use of letter and two memoranda written by county officers for limited purpose of showing motivation prompting plaintiff to purchase and develop property served by subject oxidation pond, and (4) sovereign immunity was no bar to suit.

Judgment affirmed.

West Headnotes (8)

[1] **Counties** Public improvements

Where there was no evidence of reasonable necessity for moratorium on sewer tap-ins, the county could not deny tap-in permits on ground that moratorium was a reasonable exercise of its police power.

[2] **Municipal Corporations** Nonresidents

Fact that developer of realty produced no evidence that a written agreement existed between itself and county for sewer services to subdivision located in the county did not mean that city had right to deny owner the right of tap-in.

1 Case that cites this headnote

[3] **Jury** Form and sufficiency of demand

Denial of oral motion for jury trial was not error.

[4] **Evidence** Facts or transactions described in or evidenced by writing

Best evidence rule did not prevent introduction of certified copies of deeds on file in clerk of court's office and certain notes where contents of the writings were not in issue. Code, § 38–641.

[5] **Evidence** Other particular statements or assertions

Hearsay rule did not prevent introduction of letter and two memoranda written by county officers where admission was for limited purpose of showing motivation prompting plaintiff, seeking mandamus requiring county to permit sewer tap-in, to purchase and develop property served by subject oxidation pond.

[6] **Evidence** Chemicals and chemical processes

It was not error to permit counsel for property owner, seeking mandamus requiring county to permit sewer tap-ins, to examine its president concerning his opinion as to whether oxidation pond was operating at capacity where president was qualified as a civil engineer and counsel for county was permitted to cross-examine him.

[7] **Evidence** Mode of examination in general

It could not be said that trial court refused to allow counsel to examine witness as to whether action by board of county commissioners in declaring sewer tap-in moratorium was in best interest of the county where trial court thought the question improper, but permitted it when the witness volunteered to answer and did so in the affirmative.

[8] **Public Employment** Sovereign immunity, and relation of official immunity thereto

Sovereign immunity is not applicable when action is sought to prevent the commission of a wrongful act by an officer acting under color of authority and beyond the scope of official power.

1 Case that cites this headnote

**Attorneys and Law Firms**

****499** ***83** George P. Dillard, Gail C. Flake, Decatur, for appellants.

Simmons, Warren & Szczecko, Joseph Szczecko, Decatur, for appellee.

**Opinion**

***80** UNDERCOFLER, Presiding Justice.

Townsend Associates, Inc., (TAI) brought an action against DeKalb County, its commissioners and other officers, individually and in their official capacities, seeking injunction, mandamus and declaratory judgment. Builders of a 14-unit subdivision of single family residences, TAI claimed it acted upon assurances that sewer services would be available to this property by the end of 1974; that it purchased and developed the property by December, 1975; that without notice to TAI the board of commissioners declared a moratorium on sewer tap-ins to Kingsley Oxidation Pond on October 14, 1975; and that the board arbitrarily and capriciously denied TAI's repeated applications for sewer tap-ins to this pond while granting tap-ins to others.

The defendants rebutted these claims by contending the original property owners, not TAI, received assurances regarding sewer service to the property. They also argued that TAI clearly knew septic tanks would have to be used and the final plat submitted by TAI showed this prospective use. It was argued further that the ordinance declaring a moratorium was a reasonable exercise of the police power to protect the public health and welfare.

After hearing testimony and argument of counsel without a jury, the trial court in its findings of fact and conclusions of law found that prior to the purchase of the property, TAI discussed the availability of sewage ***81** facilities and received indication from the original property owners and from defendants that sewer facilities would be available, contingent upon the completion of the development of TAI's property in the latter months of 1974. Development was completed in the fall of 1975 and a final plat recorded in December, 1975.

On October 14, 1975, the board of commissioners adopted a moratorium banning ****500** further tap-ins to the Kingsley Oxidation Pond, the only sewage and disposal facility and system immediately available to TAI. The moratorium was not limited in time nor was its necessity indicated within its terms, and although TAI repeatedly made application for tap-in permits, these were denied on the strength of the moratorium. Independent studies by the State Environmental Pollution Division of the Department of Natural Resources and the DeKalb County Water and Sewer Department showed the oxidation pond was hydraulically and organically underloaded and could easily handle the flow from TAI's 14 unit subdivision without encroaching the capacity set by state and federal governments. These studies were corroborated by a private study initiated by TAI. Lack of availability of the sewer tap-ins reduced the market potential of the lots and threatened TAI with bankruptcy. The court also found the market value of the property was cut in half by the lack of sewer services and that the defendants had introduced no evidence to show those parties who had been permitted to tap-in had had any trouble with their septic tanks prior to doing so nor that the county health department had declared the pond a public nuisance.

In its conclusions of law, the court found the moratorium was an improper exercise of the police power and invalid. Also, the court found even if the county had shown a valid need, it could not arbitrarily, unreasonably or capriciously refuse a permit to TAI without offending equal protection guarantees.

The court declared the ordinance unconstitutional, permanently enjoined the county from enforcing it as to TAI, and issued a mandamus absolute requiring the county to permit the tap-ins demanded in the suit.

[1] 1. Appellants contend that a moratorium on tap-ins *82 was a reasonable exercise of the county's police power. "To justify the State in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals." Mack v. Westbrook, 148 Ga. 690, 692, 98 S.E. 339, 341 (1918). In our opinion there was no evidence of reasonable necessity for the moratorium and we affirm the trial court. See Barrett v. Hamby, 235 Ga. 262, 265, 219 S.E.2d 399 (1975).

[2] 2. Appellant relies upon Denby v. Brown, 230 Ga. 813, 199 S.E.2d 214 (1973) to support its contention that TAI had no clear legal right to these tap-ins. Denby, supra, is inapposite. There the applicant resided Outside the city limits of Tifton and its charter permitted but did not require the city to provide sewer services there. That case does not hold that a municipal utility can arbitrarily deny such service to one of its citizens living Within its corporate limits. It is immaterial that TAI produced no evidence that a written agreement existed between the county and the appellee for sewer services.

3. "The duty to determine the constitutionality of a legislative enactment is vested in the judges, not the jury . . . Although there is no right to jury trial, the court may call for special verdicts if, in its discretion, it desires to seek a jury's aid as a fact-finding body to resolve specific factual disputes . . . This is true whether the case arises in equity, or as a declaratory judgment or mandamus action." Guhl v. Davis, 242 Ga. 356, 357-358, 249 S.E.2d 43, 45 (1978).

[3] The trial court did not err in denying appellant's oral motion for a jury trial.

[4] 4. a. The "best evidence" rule does not prevent the introduction of certified copies of plaintiff's exhibits 1 through 5, deeds on file in the clerk of court's office, and notes where the contents of the writings are not in issue. Agnor's, Georgia Evidence, 1976, s 13-1. See also Code Ann. s 38-641.

[5] b. Appellants complain that the introduction of plaintiff's exhibits 6, 18 and 19, over objection that they were hearsay as **501 to the witness on the stand, was error. We do not agree. These exhibits, a letter and two memoranda written by county officers, were admitted for the limited purpose of showing motivation prompting TAI to purchase and develop the property served by the Kingsley Oxidation Pond. Render v. Jones, 104 Ga.App. 807(3), 123 S.E.2d 196 (1961) is inapposite.

[6] c. There was no error in permitting counsel for plaintiff to examine Richard C. Woodman, President of TAI, concerning his opinion as to whether the oxidation pond was operating at capacity. Mr. Woodman was qualified as a civil engineer, and counsel for appellants was permitted to cross examine him.

[7] d. There is no merit to the contention that the court refused to allow counsel to examine the witness, Clint Stewart, as to whether the action by the board of commissioners declaring the moratorium was in the best interest of the county. The court thought the question improper, but permitted it when the witness volunteered to answer and did so in the affirmative.

[8] 5. Sovereign immunity is not applicable where an action is sought to prevent the commission of a wrongful act by an officer acting under color of authority and beyond the scope of official power. Chilivis v. National Distributing Co., 239 Ga. 651, 654, 238 S.E.2d 431 (1977).

Judgment affirmed.

All the Justices concur.

**All Citations**

243 Ga. 80, 252 S.E.2d 498

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85 Ill.App.3d 700
Appellate Court of Illinois, Second District.

CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, a National Banking Association; Consuela Cuneo Roti; John F. Cuneo, Jr.; William G. Myers; and Charles L. McEvoy, as Successor Trustees under a Declaration of Trust dated August 12, 1935, and in pursuance of Decrees of the Circuit Court of DuPage County, Illinois, entered on May 6, 1955 in Case No. 55-160, and on August 19, 1960 in Case No. 1-60-754, Plaintiffs-Appellees,

v.

VILLAGE OF MUNDELEIN, a Municipal Corporation, and Kenny Construction Company, an Illinois Corporation, Defendant-Appellant.

No. 80-80, 80-209.
|
July 7, 1980.
|
Rehearing Denied Aug. 5, 1980.

**Synopsis**

Village appealed from an order of the Circuit Court, Lake County, Robert K. McQueen, J., which enjoined it from entering upon certain legally described easement for purpose of installing or replacing sewer and from further declaratory judgment that the village had only one easement, which was in the route of the presently existing sewer, and that it had no rights in the originally described easement it obtained in 1926. The Appellate Court, Unverzagt, J., held that: (1) no legal rights were either acquired or lost by village which laid portion of actual sewer line outside described easement where neither party, apparently, was aware of the deviations; (2) where land involved was unimproved farmland and no material change of position had occurred on the part of the landowner, actions of the village in using strip of land outside the easement for a sewer line over long period of time, while failing to make use of its actual grant of easement did not constitute abandonment of the actual easement; (3) expansion of sewer line from 27-inch to 48-inch diameter was reasonably within purposes of original easement; and (4) use of strip of land outside of granted easement over a long period of time did not give village two easements for the price of one.

Judgment reversed.

**Procedural Posture(s):** On Appeal.

West Headnotes (10)

[1] **Municipal Corporations** Sewers, Drains, and Water Courses

No legal rights were either acquired or lost by village which laid portion of actual sewer line outside described easement where neither party, apparently, was aware of the deviations.

[2] **Municipal Corporations** Sewers, Drains, and Water Courses

Where neither village nor property owner, apparently, was aware of deviation by village from described easement, use by village, which laid portion of actual sewer line outside the described easement, was neither "adverse" nor "hostile" since it was not under claim of right to land actually used.

[3] **Municipal Corporations** Sewers, Drains, and Water Courses

Use by village of property outside described easement by laying portion of actual sewer line outside the easement was neither "open" nor "notorious" because neither party, apparently, was conscious that the sewer line had strayed from the grant of easement.

1 Case that cites this headnote

[4] **Easements** Prescription

To establish a way by prescription, use must be adverse, uninterrupted, exclusive, continuous, and under claim of right for period of 20 years.

[5] **Estoppel** Municipal Corporations in General

Municipality cannot be estopped to use easement which it has never expressly abandoned, except where sudden use of the easement, after long period of apparent abandonment, would prejudice other party who has relied on the apparent abandonment and changed his position, thus creating estoppel in pais.

[6] **Municipal Corporations** Parks and Public Squares and Places

Where land involved was unimproved farmland and no material change of position had occurred on the part of the landowner, actions of the village in using, either inadvertently or with deliberate intent, strip of land outside the easement for a sewer line over long period of time, while failing to make use of its actual grant of easement, did not constitute "abandonment" of village's actual easement.

[7] **Municipal Corporations** Establishment in General

Expansion of sewer line from 27-inch to 48-inch diameter was reasonably within purposes of original easement granted to village, which had grown from small village in 1926 to over 18,000 inhabitants at present time.

2 Cases that cite this headnote

[8] **Municipal Corporations** Establishment in General

Where landowner apparently never agreed to change of location of easement granted to village, village's divergence of sewer line from the original easement was not a "relocation," but, rather, was more in the nature of a "simple trespass."

1 Case that cites this headnote

[9] **Municipal Corporations** Establishment in General

By using strip of land outside granted easement over long period of time, village did not lose its right to use original easement by giving village, which had used only one path for its sewer even though it in part trespassed beyond granted easement with its actual sewer line, "two easements for the price of one."

[10] **Municipal Corporations** Establishment in General

Village's divergence of sewer line from original granted easement could not become new and separate easement without consent of the grantor.

**Attorneys and Law Firms**

***701** ****1053** *****555** Charles F. Marino, Chicago, for defendant-appellant.

Conzelman, Schultz, Snarski & Mullen, Waukegan, for plaintiffs-appellees.

**Opinion**

****1054** *****556** UNVERZAGT, Justice:

***702** This is an appeal from an order of the circuit court of Lake County which granted a preliminary injunction whereby the Village of Mundelein was enjoined from entering upon a certain legally described easement for the purpose of installing a replacement sewer thereon and from the further declaratory judgment that the Village had only one easement, being that in the route of the presently existing sewer and that it had no rights in the originally described easement it obtained in 1926.

In 1926 the Village obtained a grant of easement twenty feet wide across the land in question from Samuel Insull, the then owner of the property, for the purpose of laying a sanitary sewer beneath the surface of the land which would connect with the sewer treatment plant of the Village, also located on land acquired from Insull. The route of the easement was particularly described in legal terms customary in a legal survey however, apparently, either through inadvertence or from choice, the actual sewer line did not conform to the easement and in some places deviates as much as one-

hundred-fifty feet from the route granted by the easement. Thus, a considerable part of the actual sewer line lies outside the easement described.

It is claimed by the Village and not disputed by the plaintiffs, although they do not concede that such is the case, that the error was not known to the Village nor, presumably, to the landowners until 1977. In that year, the sewer line being worn out and in need of replacement, a survey was made for a proposed relocation of the sewer line to a more efficient route a few hundred yards east of the original route granted by the easement. At that time the legally described easement was found to be somewhat west of the actual sewer line and much of the actual grant had never been used. Since the Village had grown in the ensuing fifty years since the easement was granted and the sewer line needed to be enlarged as well as being replaced, the Village proposed to the plaintiffs that the present sewer line be abandoned and that the owners grant the Village a new easement in the more efficient location, whereupon the Village would surrender or abandon its original unused route and would take up and remove the actual sewer line now in use wherever it was less than five feet from the surface of the land.

Negotiations for the exchange of easement went on for over a period of a year, the stumbling block being that the plaintiffs were seeking certain concessions from the Village in connection with the volume of sewage to be handled as well as the cost of sewage treatment to sites on their land. The plaintiffs intend to develop their land some fourteen hundred acres and were apparently seeking to gain some advantage for this property when the sewer was replaced, in return for their consent to relaying the sewer in the location preferred by the Village. At length the negotiations broke down and the Village then went back to the original easement ***703** which it had largely not used and let bids for the construction of a forty-eight inch, instead of the existing twenty-seven inch, sewer line along the route of the original easement (which route, as noted above, differed considerably from the actual original grant of easement). In letting bids for the new forty-eight inch sewer line along the route of the original easement, the Village announced its intention of removing all of those portions of the existing twenty-seven inch sewer which were closer than five feet from the surface of the ground and making compensation to the plaintiffs for any disturbance of the ground and any loss of crops resulting from the tearing up of the old sewer and the laying of the new one. It was conceded by the Village that some temporary trespass would be inevitable in the building of the new sewer since the original twenty-foot easement would not give sufficient room for laying the new forty-eight inch sewer and some temporary incursion into the adjacent land would no doubt accompany the construction and laying of the new sewer line. The offer to exchange the original sewer easement for the new easement preferred by the Village was rejected by the plaintiffs who continued to demand ****1055** *****557** substantial concessions in the way of service and favorable price differential for the fourteen hundred acres of land they own. When the Village began preliminary digging along the route of the original easement, after negotiations had broken down for an exchange of easements, the plaintiffs commenced this action for an injunction to prevent the laying of the forty-eight inch sewer line along the original easement and also prayed for a declaration that the Village had available only one easement, which was the easement it acquired by using the actual sewer line instead of the legally described line granted by the original easement.

In this appeal from a judgment along the lines prayed for by the plaintiffs, the Village contends that (1) it still retains the right to use the original easement, not having abandoned it by using another route, whether by inadvertence or preference; (2) the replacement of the original twenty-seven inch sewer by the new proposed forty-eight inch sewer is not a violation of the easement but such replacement is implicit in the original grant of easement; (3) the Village is not estopped from using the original easement by non-use of that easement over a long period of time and (4) there is no sound basis for issuance of an injunction since (a) it will disserve the public interest and (b) no substantial injury will be done to the plaintiffs by the laying of the new sewer in a slightly different location from the present actual sewer.

In finding in its judgment order that the Village presently has no easement except a twenty-foot easement along the actual sewer line, the trial court was evidently of the opinion that the Village had abandoned the original easement by using another route over a long period of time whether the deviation from the actual grant was inadvertent or intentional is not indicated by the judge, on which point he made no finding.

***704** We believe the trial court erred in finding an abandonment of the original easement occurred. The evidence adduced at trial does not indicate the reason for the deviation from the route of the grant of easement; however, so far as can be determined from the record, it may not have been intentional but a mistake of the surveyor. Thus, we do not see any basis for either a finding that the original easement

was abandoned or that the use of the erroneous route gave the Village a substituted easement by acquiescence of the owner, along the line of the actual sewer, which in time ripened into a prescriptive easement.

[1] [2] [3] [4] We do not believe that any legal rights were either acquired or lost by laying a portion of the actual sewer line outside the described easement where neither party, apparently, was aware of the deviation. There is no evidence that either party ever had knowledge of the deviation of the actual sewer line from the language of the granted easement. The Village contends it did not realize a divergence had occurred and there is no way of establishing otherwise at this late date. The user was not adverse or hostile since it was not under a claim of right to the land actually used and it could not be said to be open or notorious because neither party, apparently, was conscious that the sewer line had strayed from the grant of easement. Thus, we see no prescriptive rights as being gained by the Village nor any rights lost by prescription to the plaintiffs. As stated by the supreme court in Poulos v. F. H. Hill Company (1948), 401 Ill. 204, 214, 81 N.E.2d 854, 859:

> "(T)o establish a way by prescription the use must be adverse, uninterrupted, exclusive, continuous and under a claim of right for a period of twenty years."

The trial court held, however, that not only did the Village gain an easement in its use of the plaintiffs' land for some fifty years but also that the Village lost its original easement by the use of the actual sewer line outside of the grant of easement. This apparently was on the theory of an abandonment of the original easement.

[5] [6] The court did not indicate the basis for its finding that the Village had lost its original easement but presumably it was on the basis of the use of the new sewer **1056 ***558 line and abandonment of the original easement, since no affirmative act is shown to have been done to release or exchange the easement. It is claimed that there was acquiescence to the new location by the plaintiffs or their predecessors but there is no evidence in the record on this. While in some rare instances a municipality has been held to have lost an easement by abandonment, such cases are generally based on an estoppel, where the other party has been prejudiced by a change in position induced by an appearance of abandonment. It appears to be the law in Illinois that a municipality cannot be estopped to use an easement it has never expressly abandoned, except where the sudden use of the *705 easement, after a long period of apparent abandonment, would prejudice the other party, who has relied on the apparent abandonment and changed his position, thus creating an estoppel in pais. (See Zemple v. Butler (1959), 17 Ill.2d 434, 161 N.E.2d 818; Kennedy v. Town of Normal (1934), 359 Ill. 306, 194 N.E. 576; Loewenthal v. City of Highland Park (1966), 70 Ill.App.2d 236, 216 N.E.2d 825; Annot., 44 A.L.R.3d 289 (1972).) No such circumstances are present here, the land being unimproved farm land and no material change of position having occurred. It is clear, therefore, that the actions of the Village in either inadvertently or with deliberate intent using a strip of land outside of the easement over a long period of time without apparent prejudice to the owner while failing to make use of its actual grant of easement did not constitute an abandonment of the Village's actual easement. Under the circumstances of this case, we see no evidence supporting the theory that there was an abandonment of this original easement. See Kurz v. Blume (1950), 407 Ill. 383, 95 N.E.2d 338, where a non-user, even by a private grantee, was not held to have constituted an abandonment of the easement.

[7] It is also contended by the plaintiffs that the Village would be exceeding the rights granted it under the easement by replacing a twenty-seven inch sewer with a forty-eight inch sewer. In Heuer v. Webster (1914), 187 Ill.App. 273, 278, the court cited the language of the English case of Newcomer v. Coulsen, L.R., 5 Ch.Div. 133, to the effect that " ' * * * the right of way is one including the right of improving, from time to time, according to the improvements of the age.' ", in upholding an expanded use of an easement. In Weaver v. Natural Gas Pipeline Co. (1963), 27 Ill.2d 48, 188 N.E.2d 18, the court held that the replacement of an original four-inch sewer pipe with a new ten-inch sewer pipe was within the intention of the easement and in Talty v. Commonwealth Edison Company (1976), 38 Ill.App.3d 273, 347 N.E.2d 74, the Third Appellate District held that an easement for a transmission line was not violated by replacing the original 220 volt line with a 345 volt line and the existing 30.3 square foot foundation with a 45.4 foot foundation. In the case before us, the testimony indicated the population of the Village had grown from a small village in 1926 to over 18,000 inhabitants at present and the need for an enlarged sewer capacity is obvious. It hardly requires argument to establish that the sewer needs expansion and, in our opinion, its expansion

from a twenty-seven inch to a forty-eight inch diameter is reasonably within the purposes of the original easement. In Weaver v. Natural Gas Pipeline Co., the supreme court said:

> "It is well established that where an easement is created by express grant, the extent of the right acquired depends not upon user, as in the case of easements by prescription, but upon the terms of the grant. (28 C.J.S. Easements sec. 75.) Furthermore, the ***706** practical construction placed upon the instrument by the acts of the parties is to be considered only if there is an ambiguity." 27 Ill.2d 48, 50, 188 N.E.2d 18, 19.

In this case, the Village's consulting engineer testified that the present sewer was "overloaded," "worn out," and "in need of replacement." The easement under consideration was an express grant free of any ambiguity and was not strictly limited to the use of the easement, as the plaintiffs contend. We think that in line with the ****1057** *****559** cases cited above the use must be allowed a practical interpretation in accordance with the reasonable need to be expected in the future.

**[8]** **[9]** **[10]** In ruling that the Village had lost its right to use the original easement which it referred to as the "described path" the court evidently adopted the plaintiffs' argument that to allow the Village to revert to using the original easement to install the new contemplated forty-eight inch sewer line would in effect give the Village "two easements for the price of one in violation of the constitution." The catch phrase "two easements for the price of one" is used by the plaintiffs in disregard of the actual facts. It is clear from the testimony of the Village's witnesses and the arguments before the court that the Village has never claimed the right to use two easements and has never used two "easements." While the Village used only a part of the granted easement and in part trespassed beyond that easement with its actual sewer line, it needed and used only one path for its sewer. The actual path was partly within the legally described path and partly a divergence from that path, which neither the Village, as far as the record indicates, nor the plaintiffs, ever took cognizance of as a separate easement. Nor could the divergence become a new and separate easement without the consent of the grantor. (See Sullivan v. Bagby (1929), 335 Ill. 192, 166 N.E. 449; Triplett v. Beuckman (1976), 40 Ill.App.3d 379, 352 N.E.2d 458.) What it amounts to is simply an easement which the grantee diverged from in some places unknown to either the grantor or the grantee. Since the parties never agreed, so far as is indicated, to change the location of the easement, it was not a relocation and was more in the nature of a simple trespass where the sewer line diverged from the easement originally granted. The statement of the Village attorney and the testimony of the Village's consulting engineer make it clear that the Village has no intention of using the existing sewer line after completion of the new sewer within the legally described easement. While use must be made of the existing sewer until the new one is completed, only one line will actually be used at any one time. Naturally, sewer service must be maintained during the period of construction of the new sewer but this is a practical necessity for the community and does not necessarily denote a claim of an additional easement by the Village. The Village obviously does ***707** not intend to operate the existing sewer any longer than it will take to construct the new one, so the fact that it will retain the use of the existing sewer while it is constructing the new one reflects only the exigencies of the community's sewer problem, not the Village's intent to obtain an additional easement.

The Village has also made it a condition of the new sewer construction contract that the existing sewer line be entirely removed in any place where it is less than five feet from the surface. It is true, of course, that the Village contended in its brief and its oral argument that it had obtained an easement by prescription over the fifty-year period in which it used the divergent sewer line, but since the Village admits at the same time that it was not aware of the deviation from the original granted easement and thus could not have made a claim adverse or hostile to the rights of the owner, this idea of a right of easement by prescription does not have any legal basis.

On the basis of the record before us, it is clear that the Village did not abandon or exchange its original grant of easement and still retains it. While we are of the opinion that the Village did not gain any rights by prescription through its trespass beyond the path of the legally described easement, neither did it lose the rights it already had and, as the cases cited above indicate, its right of easement was not defeated by the mere passage of time and the non-use of the easement. The authorities cited also indicate quire clearly that a municipality will not be held to have abandoned an easement by non-use where no third person's rights have been prejudiced in reliance on an appearance of abandonment. Thus, the Village still retains its original easement and the injunction prohibiting it from using ****1058** *****560** it to construct a needed enlarged sewer should be dissolved.

The judgment of the circuit court of Lake County is accordingly reversed.

JUDGMENT REVERSED.

SEIDENFELD, P. J., and NASH, J., concur.

**All Citations**

85 Ill.App.3d 700, 407 N.E.2d 1052, 41 Ill.Dec. 554

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